No. 2193

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE PACIFIC STATE BANK, a Corporation,
Appellant,

vs.

A. S. COATS, as Trustee in Bankruptcy of RAYMOND BOX COMPANY, a Corporation, Bankrupt, et al.,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Western Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

FILED
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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

ELMER M. HAYDEN, Esquire, #408 Perkins Building, Tacoma, Washington,

MAURICE A. LANGHORNE, Esquire, #408 Perkins Building, Tacoma, Washington,

H. W. B. HEWEN, Esquire, Attorney at Law, South Bend, Washington,

Attorneys for the Pacific State Bank, Appellant.

CHARLES E. MILLER, Esquire, South Bend, Washington,

Attorney for A. S. Coates, Trustee in Bankruptcy of Raymond Box Co.

JOHN T. WELSH, Esquire, South Bend, Washington, and

MARTIN C. WELSH, Esquire, South Bend, Washington,

Attorneys for Pacific Transportation Co., and Others, Creditors of said Raymond Box Company, Bankrupt.

Stipulation [for Omission of Caption of All Papers].

It is hereby stipulated that the caption of all instruments, other than that first prepared, may be omitted in preparing the transcript on appeal herein, and said transcript of the instruments without the caption shall be with like effect as though they were

shown properly captioned in the Court and Cause.

Dated September 25th, 1912.

CHAS. E. MILLER,
Attorney for Trustee.
WELSH & WELSH,
Attorneys for Certain Creditors.
H. W. B. HEWEN,
HAYDEN & LANGHORNE,
Attorneys for Pacific State Bank.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Sep. 28, 1912. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [1*]

In the District Court of the United States, for the Western District of Washington, Western Division.

IN BANKRUPTCY.—No. 1054.

In the Matter of the RAYMOND BOX COMPANY, Bankrupt.

Petition of the Pacific State Bank [for Order Authorizing Foreclosure Proceedings, etc.].

To the Hon. Judges of the Above-entitled Court, and to the Hon. WARREN A. WORDEN, Referee in Bankruptcy:

Comes now the Pacific State Bank, and respectfully petitions your Honors, and represents as follows, to wit:

I.

That at all of the times hereinafter mentioned your petitioner was and now is a corporation, organized

*Page-number appearing at foot of page of original certified Record.

and existing under and by virtue of the laws of the State of Washington, and has paid its annual license fee last due, and is entitled to wage suits and actions at law or equity in the courts of the United States and of the State of Washington.

II.

That at all the times hereinafter mentioned, the Raymond Box Company, the bankrupt herein, was, and now is a corporation, organized and existing under and by virtue of the laws of the State of Washington, and has it principal [2] place of business at Raymond, Pacific County, Washington, in the Western District of such State, which said last-named corporation was, on or about the —— day of ————, 1912, adjudged bankrupt by this Court.

III.

That heretofore, and on or about the 2d day of December, 1910, the petitioner loaned to the bankrupt the sum of Twenty-three Thousand Four Hundred ($23,400) Dollars, and in consideration thereof the bankrupt made, executed and delivered to petitioner its certain promissory note of that date, in words, figures and letters following, to wit:

"$23400 South Bend, Wash., December 2, 1910.

THREE MONTHS after date, without grace, for value received, I, we or either of us, as principals, promise to pay to the PACIFIC STATE BANK, or order, at their bank in South Bend, Washington, TWENTY THREE THOUSAND FOUR HUNDRED DOLLARS, in United States gold coin, with interest thereon in like gold coin at the rate of eight

per cent. per annum from date until paid. Interest payable at maturity quarterly, and if the interest is not paid when due, then the principal and interest becomes immediately due and collectible at the option of the holder of this note.

If this note is not paid when due, we agree to pay all reasonable costs of collection, including attorney's fees which the court may adjudge or deem to be reasonable and proper, and also consent that judgment may be entered for these amounts by any Justice of the Peace of proper jurisdiction.

It is hereby expressly agreed and understood that in the event of any suit or action being brought against the maker, or makers of this note, dissolution of partnership, retiring from or disposing of business, [3] death, or any loss by fire the amount then remaining unpaid, together with interest, shall at once become due and payable, and the owner hereof may take immediate action hereon.

For value received, each and every person signing or endorsing this note, hereby waives presentment, demand protest and notice of non-payment thereof, binds himself as principal, not as security, and promises that if suit be brought to collect the same, or any part thereof, and hereby waiving all the provisions of the deficiency judgment law, and the valuation and appraisement laws of the state of Washington.

(Signed) RAYMOND BOX COMPANY,
By J. A. HEATH, Pres.
MILES H. LEACH, Sec."
[Corporate Seal]

IV.

That at the same time and place, to wit, South Bend, Washington, December 2, 1910, to secure the payment of said promissory note, the bankrupt made, executed, acknowledged and delivered to the petitioner its certain mortgage of that date, a copy of which is attached hereto, marked Exhibit "A," which exhibit your petitioner asks to be made a part hereof in all respects as though said mortgage was set out in full herein, which said mortgage was duly filed for record in the office of the auditor of Pacific County, Washington, being the county in which the property covered thereby is situated, on the 8th day of December, 1910, and was recorded on said date in Book 30 of mortgage records of said county at page 31, and said mortgage was also filed as a chattel mortgage in the office of the auditor of Pacific County, Washington, on the same date as chattel mortgage, file No. 604. [4]

V.

That said indebtedness has not been paid, nor has any part thereof been paid, excepting only as follows:

Dec. 19, 1910	$ 400.00
Dec. 22, 1910	298.29
Dec. 28, 1910	350.00
Mar. 3, 1911	449.05
Nov. 29, 1911, interest to Oct. 1st, 1911	1038.11

and there is now due thereon the full sum of Twenty-two Thousand, Three Hundred Fifty-one and 71/100 ($22,351.71) Dollars, with interest from October 1st, 1911, at eight per cent per annum.

VI.

That as appears by the terms of said mortgage, the property covered thereby consists of real and personal property, and constitutes a manufacturing plant for the manufacture of boxes; that there is a large amount of machinery and equipment installed in said plant, which machinery and equipment will fast deteriorate unless said plant is properly operated and maintained; that since the institution of the proceedings in bankruptcy herein, your petitioner has been informed and alleges the fact to be that said plant has for some months just prior to the institution of these proceedings been operated at a loss; that the box business requires considerable operating capital in the way of stock on hand for manufacture and manufactured stock, and accounts receivable, and without a large capital, in addition to the plant itself, it is impracticable to operate a business of that nature, except at a loss and except at serious handicap. [5]

VII.

That the value of said property is not greater than the amount of the claim of your petitioner against said property; that unless said property is sold to satisfy your petitioner's claim, the value thereof will fast become less, and your petitioner will be unable to realize therefrom sufficient to pay its claim, and your petitioner further alleges that the interests of the bankrupt estate, and of this petitioner and of all the creditors of said bankrupt will be best subserved and protected if an immediate sale of all the property of the said bankrupt now in possession and under

the control of the trustee, or which may hereafter come under his control, be had; that the costs and expenses of keeping said property will be great, and will rapidly accumulate, and that unless immediate sale of all of said property be had, the same will be greatly reduced by reason of such expenses and of the upkeep of the same.

VIII.

That your petitioner further alleges that said claim is a first mortgage and prior lien upon said property and all of it, prior to the claims of any other persons whomsoever, excepting the taxes for 1011; and your petitioner further alleges that it has no other security for the moneys so due and owing to it by the said bankrupt, and that the insurance companies which have been heretofore carrying policies of insurance on the property mentioned and described in Exhibit "A" have, in part, cancelled the same, and refused longer to carry insurance on said described property.

Your petitioner further alleges in connection with the foregoing that the policies of [6] insurance covering said property provide that the fact of insolvency through bankruptcy proceedings, or the appointment of a receiver, shall be of itself a cancellation of said policies, and the termination of the liability of the insurance companies thereunder.

IX.

That your petitioner further states that it files this petition, for the purpose of having this Court speedily act upon the matters and things herein contained, to the end that said described property may be

sold before it deteriorates in value, and before a partial or a total loss will be sustained by your petitioner, and if a sale is ordered and made under this petition, your petitioner prays that the costs and expenses of administering the bankrupt's estate be not charged against the property upon which your petitioner has a lien for the moneys so advanced to said bankrupt by it.

WHEREFORE your petitioner prays that an order may be entered herein authorizing your petitioner to bring proceedings of foreclosure in such court as may have jurisdiction thereof, making such parties as your petitioner may be advised should be made parties thereto.

If the Court should be of the opinion that the matters hereinbefore referred to and set out should be determined in this court, then your petitioner prays that the amount of said claim may be forthwith determined herein; that upon such amount being determined, that such amount may be adjudged to be a first and prior lien on all the property described in said mortgage so hereinbefore referred to, to the exclusion of all liens, if any, [7] against the same, and that a reasonable attorney's fee to be fixed by this Court be adjudged to your petitioner, in accordance with the terms and condition of said note and mortgage, in addition to the amount due thereon as principal and interest, and that this Court may forthwith order a sale of said property in such manner and form as the Court may deem just, but that said sale shall be without delay, excepting only to give such notice as the law and practice of this Court

prescribes; that upon such sale, your petitioner may be adjudged to have, and may have the right to bid the amount so adjudged to be due it, and to turn in on its bid to the extent of such claim, its said note, or make credit upon said note for the amount of petitioner's bid at such sale, and that the Court may make such other and further orders in the premises as may be just and equitable.

PACIFIC STATE BANK,
By J. G. HEIM, President,
Petitioner.

H. W. B. HEWEN,
HAYDEN & LANGHORNE,
Attorneys for Petitioner.

State of Washington,
County of Pierce,—ss.

J. G. Heim, being first duly sworn, deposes and says under oath, that he is President of the petitioner above named; that he has read the foregoing petition, knows the contents thereof, and that the *said* is true, as he verily believes.

J. G. HEIM. [8]

Subscribed and sworn to before me this 18th day of March, 1912.

[Seal] E. M. HAYDEN,
Notary Public in and for Said County and State, Residing at Tacoma.

Exhibit "A" [to Petition of Pacific State Bank].

[Mortgage, Dated December 2, 1910—Raymond Box Co. to Pacific State Bank.]

THIS INDENTURE made this 2d day of December, 1910, between the Raymond Box Company, a corporation, organized and existing under the laws of the State of Washington, party of the first part and Pacific State Bank, also a corporation organized and existing under the laws of the State of Washington, party of the second part;

WITNESSETH: That the said party of the first part for and in consideration of the sum of $23,400.00, lawful money of the United States, in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the party of the second part, and to its successors and assigns, the following real and personal property, privileges and franchises, particularly described as follows, to wit:

Block B of the First Addition to Raymond, Pacific County, Washington, according to the plat thereof on record in the office of said county, together with all buildings and structures situated thereon.

Also a tract described as follows: Beginning at a point on bank of slough South 19° 06′ East 67.2 feet distant from the Southwest corner of 7th Street and Heath Street, Avenue, of the First Addition to the Town of Raymond, as the same has been platted by John Henry, surveyor; thence North 74° 22′ East 130.8 feet; thence South 89° 19′ East 79.4 feet; [9] thence North 55° 57′ East 56.1 feet; thence North 43°

54′ East 61.5 feet; thence North 83° 54′ East 76.7 feet; thence South 60° 17′ East 99.7 feet; thence South 18° 0′ East 131.2 feet; thence South 62° 22′ East 58.4 feet; thence South 26° 19′ West 113.3 feet; thence North 50° 32′ West 104.3 feet; thence 17° 55′ West 117.6 feet; thence North 41° 46′ West 34 feet; thence North 82° 12′ West 34.5 feet; thence South 44° 14′ West 105.32 feet; thence South 88° 27′ West 123 feet; thence South 80° 55′ East 56.4 feet; thence South 49° 44′ West 22.3 feet; thence South 23° 51′ East 39.6 feet; thence North 19° 06′ West 122.8 feet to the place of beginning.

Also the grantor's right to use the channel or cut off slough.

Beginning at a point 141.1 feet South and 571.7 feet East of the Southwest corner of 7th Street and Heath Street Avenue; of the First Addition to the Town of Raymond, as the same has been platted by John Henry, surveyor; thence North 57° 18′ East 165.5 feet; thence North 51° 37′ East 69.4 feet; thence North 31° 11′ East 108.2 feet; thence North 22° 15′ East 70.9 feet; thence South 72° 4′ East 121.4 feet; thence South 26° 51′ West 82 feet across slough; thence North 60° 16′ West 62.9 feet to bank of meander slough; thence South 89° 27′ West 61.4 feet; thence South 29° 45′ West 83.9 feet; thence South 57° 0′ West 199.7 feet; thence South 60° 10′ West 144.7 feet; thence North 26° 19′ West 113.3 feet to place of beginning.

Also the following machinery situated in the mill in said Block B: 1 Atlas Boiler 18′ x 72″–4 Flue; 1 Atlas Twin Engine: Cylinder 11″ x 16″; 1 Union

Machine Co. Drag Saw, Machine 48 stroke; 1 Log Jack; 1 Log carriage and feed works for same; 1 canting geer; 1 Crane for lifting blocks; **[10]** 1 Power bolter; with 70″ inserted tooth saw; 1 Large Columbia Box Board Machine 52″ saw; 1 Wood's Double Surfacer; 1 Frank Machinery Co. Pony Planer; 3 rip-saw tables; two with adjustable saws and automatic feed; 1 double automatic feed cut-off saw; 1 Hall & Brown 36″ Circular Resaw; 1 Swing Cut-off with feet lever, friction feed; 1 Box Board Printer; 1 outfit for filing and grinding circular and band-saws, including *to* grinding machines; two tieing machines, Lamb Manufacture; 1 Planer knife, grinder; 1 complete dust collection system. All conveyers; all piping for dry kiln; 40 dry kiln trucks; 1 transfer truck; all railroad tracks; 1 Berlin Band Resaw machine, including saws; 1 Morgan tongue and Groove Box Board matcher; all belts, shafting, and Transmission machinery, together with all fixtures and implements, real or personal property used in the operation of the plant of the Raymond Box Company, at Raymond, Washington, on said Block B and slough adjoining thereto. Also contract for water privileges of mill with Raymond Water Co.

Also the safe, desk, tables, stove, letter-press and all office furniture of the first part, situated on said premises, together with all and singular the tenements, hereditaments, appurtenances and privileges thereunto belonging.

It is also agreed that the first party shall keep the building and machinery insured in such standard fire insurance company as the party of the second

part may designate during the life of this mortgage in the sum of not less than $11,000.00, with loss, if any, payable to the mortgagor, as its interest may appear.

In the event that the mortgagor fails to procure said insurance and deliver the policy therefor to the second party, **[11]** the second party shall have the right to take out said insurance, and the premium cost thereof shall be deemed secured by this mortgage and included therein.

This agreement is intended as a mortgage to secure the payment of $23,400.00, lawful money of the United States, together with interest thereon at the rate of 8 per cent per annum, payable at maturity, at the banking-house of the second party in South Bend, Washington, and according to the terms and conditions of one (payable in three months) promissory note, bearing even date herewith, made by the Raymond Box Co., and payable to the order of the Pacific State Bank; and these presents shall be void if such payments be made according to the terms and conditions thereof, but in case default is made in the payment of principal or interest of said promissory note, or any portion thereof as the same may become due and payable according to the terms and conditions thereof, or for breach of any of the covenants of this mortgage, then the party of the second part, its successors and assigns, are hereby empowered to sell the said property in the manner prescribed by law, and out of the money arising from said sale to retain the whole of said principal and interest, whether the same shall be then due or not, together

with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, its successors or assigns. And in any suit or other proceeding that may be had for the recovery of said principal sum and interest, on either said note or this mortgage, it shall and may be lawful for the said party of the second part, its successors and assigns to include in the judgment that may be recovered, counsel fees and charges of attorneys and counsel **[12]** employed in such suit, as well as all payments that the said party of the second part, its successors and assigns, may be obliged to make for its security by insurance or on account of any taxes, charges, incumbrances or assessments whatsoever on the said premises or any part thereof.

The party of the first part hereby warrants the title to the property above mortgaged and represents that the same are free and clear of incumbrances.

In witness whereof, the said party of the first part has hereunto affixed its corporate seal and these presents to be affected by its President and Secretary with the authority of the Board of Trustees.

RAYMOND BOX COMPANY.

By J. A. HEATH,
President.

Attest: MILES H. LEACH,
Secretary.

[Seal of Corporation.] **[13]**

State of Washington,
County of Pacific,—ss.

Be it remembered that on this 2d day of December, 1910, before me, the undersigned, a notary public in and for the State of Washington personally appeared the within named J. A. Heath and Miles H. Leach, each to me well known to be the identical persons above named and whose names are subscribed to the within and foregoing instrument, the said J. A. Heath as president and the said Miles H. Leach, as secretary of said corporation, and the said J. A. Heath acknowledged to me then and there that he as president of said corporation had affixed said name, together with his own name, freely and voluntarily as his free act and deed and the free act and deed of said corporation; and the said Miles H. Leach also then and there acknowledged to me that he is secretary of said corporation, had signed the above instrument as secretary of said corporation by his free and voluntary act and deed, and the free and voluntary act and deed for said corporation.

Witness my hand and official seal.

[Notarial Seal] H. W. B. HEWEN,
Notary Public, Residing at South Bend, Washington.

[14]

AFFIDAVIT.

State of Washington,
County of Pacific,—ss.

We, J. A. Heath and Miles Leach, President and Secretary respectively of the Raymond Box Company, a corporation, the above-named mortgagor,

after being duly sworn on oath, say that the foregoing mortgage is made in good faith and without any desire to hinder, delay or defraud creditors.

J. A. HEATH.
MILES H. LEACH.

Sworn to and subscribed before me this 2d day of December, 1910.

[Notarial Seal] H. W. B. HEWEN,
Notary Public, Residing at South Bend, Washington.

[Endorsed:] "Filed this 18th day of March, 1912, at 2:00 P. M. Warren A. Worden, Referee in Bankruptcy." **[15]**

[Note, Dated December 2, 1911.]

$23400. South Bend, Wash., December 2, 1911.

Three months after date, without grace, for value received, I, we, or either of us as principals, promise to pay to the PACIFIC STATE BANK or order, at their Bank in South Bend, Wash., TWENTY-THREE THOUSAND FOUR HUNDRED DOLLARS in United States Gold Coin, with interest thereon in like Gold Coin at the rate of EIGHT per cent. per annum from DATE until paid, interest payable AT MATURITY, QUARTERLY, and if the interest is not paid when due, then the principal and interest becomes immediately due and collectible, at the option of the holder of this note.

If this note is not paid when due WE agree to pay all reasonable costs of collection, including attorneys' fees which the Court may adjudge or deem to be reasonable and proper, and also consent that judg-

ment may be entered for these amounts by any Justice of the Peace of proper jurisdiction.

It is hereby expressly agreed and understood that in the event of any suit or action being brought against the maker or makers of this note, dissolution of partnership, retiring from or disposing of business, death, or any loss by fire, the amount then remaining unpaid, together with interest, shall at once become due and payable, and the owner hereof may take immediate action hereon.

For value received each and every person signing or endorsing this note, hereby waives presentment, demand, protest and notice of nonpayment thereof, binds himself thereon as principal—not as security—and promises that if suit be brought to collect same or any part thereof, and hereby waiving all the provisions of the deficiency judgment law, and the valuation and appraisement laws of the State of Washington. **[16]**

RAYMOND BOX CO.
By J. A. HEATH, Pres.
MILES H. LEACH, Sec.

[Raymond Box Company Seal]

(#773)

[Endorsed]:

12–19–10. Pd. on within $400.00.
12–12–10. " " " 298.29.
12–28–10. " " " 350.00.
Mar. 3, 1911. Int. Paid to 3–2–11–$449.05.

Mar. 2–11. Balance due $22,351.71.
11–29–11. Int. to 10–1–11–$1038.11.

[17]

[Mortgage, Dated December 2, 1910—Raymond Box Co. to Pacific State Bank (Recorded).]

THIS INDENTURE made this 2d day of December, 1910, between the Raymond Box Company, a corporation, organized and existing under the laws of the State of Washington, party of the first part and Pacific State Bank, also a corporation organized and existing under the laws of the State of Washington, party of the second part:

WITNESSETH: That the said party of the first part for and in consideration of the sum of $23,400, lawful money of the United States, in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the party of the second part and to its successors and assigns, the following real and personal property, privileges and franchises, particularly described as follows, to wit:

Block B of the First Addition to Raymond, Pacific County, Washington, according to the plat thereof on record in the office of said county, together with all buildings and structures situated thereon.

Also a tract described as follows: Beginning at a point on bank of slough South 19° 06′ East 67.2 feet distant from the Southwest corner of 7th Street and Heath Street Avenue of the First Addition to the Town of Raymond, as the same has been platted by John Henry, Surveyor; thence North 74° 22′ East 130.8 feet; thence South 89° 19′ East 79.4 feet; thence North 55° 57′ East 56.1 feet; thence North 43° 54′ East 61.5 feet; thence North 83° 54′ East 76.7 feet; thence South 60° 17′ East 99.7 feet; thence

South 18° 0′ East 131.2 feet; thence South 62° 22′ East 58.4 feet; thence South 26° 19′ West 113.3 feet; thence North 50° 32′ West 104.3 feet; thence North 17° 55′ West 117.6 feet; thence North 41° 46′ West 34 feet; thence North 82° 12′ West 34.5 feet; thence South 44° 14′ West 105.32 feet; thence South 88° 27′ West 123 feet; thence South 80° 55′ East 56.4 feet; thence South 49° 44′ West 22.3 feet; thence [18] South 23° 51′ East 39.6 feet; thence North 19° 06′ West 122.8 feet to the place of beginning.

Also the grantor's right to use the channel or cut off slough beginning at a point 141.1 feet South and 571.7 feet East of the Southwest corner of 7th Street and Heath Street Avenue; of the First Addition to the Town of Raymond, as the same has been platted by John Henry, surveyor; thence North 57° 18′ East 165.5 feet; thence North 51° 37′ East 69.4 feet; thence North 31° 11′ East 108.2 feet; thence North 22° 15′ East 70.9 feet; thence South 72° 4′ East 121.4 feet; thence South 26° 51′ West 82 feet across slough; thence North 60° 16′ West 62.9 feet to bank of meander slough; thence South 89° 27′ West 61.4 feet; thence South 29° 45′ West 83.9 feet; thence South 57° 0′ West 199.7 feet; thence South 60° 10′ West 144.7 feet; thence North 26° 19′ West 113.3 feet to place of beginning.

Also the following machinery situated in the mill in said Block B: 1 Atlas Boiler 18′ x 72″–4″ Flue; 1 Atlas Twin Engine; Cylinder 11″ x 16″; 1 Union Machine Co. Drag-saw, Machine 48 stroke; 1 Log Jack; 1 Log carriage and feed works for same; 1 canting geer; 1 crane for lifting block; 1 Power bolter; with

70″ inserted tooth saw; 1 Large Columbia Box Board Machine 52″ saw; 1 Woods Double Surfacer; 1 Frank Machinery Co. Pony Planer; 3 rip-saw tables; two with adjustable saws and automatic feed; 1 double automatic feed cut off saw; 1 Hall & Brown 36″ Circular Resaw; 1 Swing Cit-off with foot lever, friction feed; 1 Box Board Printer; 1 outfit for filing and grinding circular and band-saws including two grinding machines, two tieing machines, Lamb Manufacture; 1 Planer knife, grinder, 1 Complete dust collecting system. All conveyors; all piping for dry kiln; 40 dry kiln trucks; 1 transfer truck; all railroad tracks; 1 Berlin Band resaw machine, including saws; [19] 1 Morgan Tongue and Groove Box Board and matcher; all belts, shafting, and transmission machinery, together with all fixtures and implements, real or personal property used in the operating of the plant of the Raymond Box Company, at Raymond, Washington, on said Block B and slough adjoining thereto.

Also contract for water privileges of mill with Raymond Water Co.

Also the safe, desk, tables, stove, letter-press and all office furniture of the first party situated on said premises, together with all and singular the tenements, hereditaments, appurtenances and privileges thereunto belonging.

It is also agreed that the first party shall keep the buildings and machinery insured in such standard fire insurance company as the party of the second part may designate during the life of this mortgage in the sum of not less than $11,000, with loss, if any,

payable to the mortgagor, as its interest may appear.

In the event that the mortgagor fails to procure said insurance and deliver the policy therefor to the second party, the second party shall have the right to take out said insurance; and the premium cost thereof shall be deemed secured by this mortgage and included therein.

This agreement is intended as a mortgage to secure the payment of $23,400, lawful money of the United States, together with interest thereon at the rate of 8 per cent per annum, payable at maturity, at the banking-house of the second party in South Bend, Washington, and according to the terms and conditions of one (payable in three months), promissory note, bearing even date herewith, made by the Raymond Box Company and payable to the order of the Pacific State Bank; and these presents shall be void if such payments be made according to the terms and conditions thereof, but in case [20] default is made in the payment of principal or interest of said promissory note, or any portion thereof as the same may become due and payable according to the terms and conditions thereof, or for breach of any of the covenants of this mortgage, then the party of the second part, its successors and assigns, are hereby empowered to sell the said property in the manner prescribed by law, and out of the money arising from said sale to retain the whole of said principal and interest, whether the same shall be then due or not, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand to the

said party of the first part, its successors or assigns. And in any suit or other proceeding that may be had for the recovery of said principal sum and interest, or either said note or this mortgage, it shall and may be lawful for the said party of the second part, its successors and assigns, to include in the judgment that may be recovered, counsel fees and charges of attorneys and counsel employed in such suit, a reasonable sum, which shall be taxed as part of the costs of such suit, as well as all payments that the said party of the second part, its successors and assigns, may be obliged to make for its security by insurance or on account of any taxes, charges, incumbrances or assessments whatsoever on the said premises or any part thereof.

The party of the first part hereby warrants the title to the property above mortgaged and represents that the same are free and clear of incumbrances.

In witness whereof, the said party of the first part has hereunto affixed its corporate seal and these presents to be affected by its President and Secretary with the authority of the Board of Trustees. [21]

RAYMOND BOX COMPANY.
By J. A. HEATH,
President.

Attest: MILES H. LEACH,
Secretary.

[Corporate Seal of Raymond Box Company.]

State of Washington,
County of Pacific,—ss.

Be it remembered that on this 2d day of December, 1910, before me, the undersigned, a notary public in

and for the State of Washington, personally appeared the within named J. A. Heath and Miles H. Leach, each to me well known to be the identical persons above named and whose names are subscribed to the within and foregoing instrument, the said J. A. Heath, as president, and the said Miles H. Leach, as secretary of said corporation, and the said J. A. Heath acknowledged to me then and there that he as president of said corporation had affixed said name together with his own name, freely and voluntarily as his free act and deed and the free act and deed of said corporation; and the said Miles H. Leach also then and there acknowledged to me that he as secretary of said corporation had signed the above instrument as secretary of said corporation by his free and voluntary act and deed and the free and voluntary act and deed of the said corporation. Witness my hand and official seal.

[Notarial Seal] H. W. B. HEWEN,
Notary Public Residing at South Bend, Washington.

AFFIDAVIT.

State of Washington,
County of Pacific,—ss.

We, J. A. Heath and Miles H. Leach, president and [22] secretary respectively of the Raymond Box Company, a corporation, the above-named mortgagor, after being duly sworn on oath, say that the foregoing mortgage is made in good faith and without any desire to hinder, delay or *fraud* creditors.

J. A. HEATH.
MILES H. LEACH.

Sworn to and subscribed before me this 2d day of December, 1910.

[Notarial Seal] H. W. B. HEWEN,
Notary Public Residing at South Bend, Washington.

[Endorsed]: 12,640. 604 Raymond Box Company to Pacific State Bank.

State of Washington,
County of Pacific,—ss.

Received for record this 8th day of December, 1910, at 1:15 o'clock P. M., and recorded at request of Pacific State Bank in Book 30 of Mortgage Records of Pacific County, Wash., on page 31.

Witness my hand and official seal.

E. A. SEABORG,
County Auditor.

State of Washington,
County of Pacific,—ss.

I, Oren C. Wilson, County Auditor of Pacific County, Washington, do hereby certify that the above, foregoing and attached, consisting of 5 sheets, is a full, true and correct copy of an instrument heretofore filed in my office as a Chattel Mortgage, and [23] also filed and recorded in my office as a real estate mortgage.

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of my office this twenty-third of March, nineteen twelve.

[Seal] OREN C. WILSON,
County Auditor.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jul. 26, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [24]

[Proof of Claim of Pacific State Bank.]

IN BANKRUPTCY.

At South Bend, Pacific County, Washington, in the said District of Washington, on the 23d day of July, 1912, came L. W. Homan of South Bend aforesaid, in the county of Pacific, in the said District of Washington, and made oath, and says that he is cashier of the Pacific State Bank, a corporation organized and existing under the laws of the State of Washington, engaged in the business of banking at South Bend, aforesaid, and that he makes this proof of claim for and in said bank's behalf, and by authority of said bank, and that Raymond Box Company, a corporation, against whom a petition for adjudication of bankruptcy has been filed, and adjudication entered, was at and before the filing of said petition, and still is, justly and truly indebted to said Pacific State Bank in the sum of Twenty-three Thousand seventeen and 29/100ths ($23,017.29) Dollars; that the consideration of said debt is money loaned by said bank to the defendant; that no part of said debt has been paid, and that there are no setoffs or counterclaims to the same. That attached hereto is the original note and copy of mortgage given by said Raymond Box Company to said bank to secure said claim, which note shows all endorsements and payments thereon; that the only securities held by this

deponent for said debt are the real estate and chattel mortgage, a copy of which is hereto attached, and that the original instrument is now on file with and in the custody of the County Auditor for Pacific County, Washington, pursuant to the laws of the State of Washington.

That $3,000.00 is a reasonable attorney's fee to be allowed claimant for collection of this note as provided therein.

L. W. HOMAN.

Subscribed and sworn to before me this 23d day of July, 1912.

[Seal] H. W. B. HEWEN,
Notary Public in and for the State of Washington,
Residing at South Bend, Said State. **[25]**

COPY OF NOTE.

$23,400.00 South Bend, Wash, December 2, 1910.

THREE MONTHS after date, without grace, for value received, I, we, or either of us as principals, promise to pay to the PACIFIC STATE BANK or order, at their Bank in South Bend, Wash. TWENTY-THREE THOUSAND & FOUR HUNDRED DOLLARS in United States Gold Coin, with interest thereon in like Gold Coin at the rate of EIGHT per cent per ANNUM from DATE until paid, interest payable AT MATURITY, QUARTERLY and if the interest is not paid when due, then the principal and interest becomes immediately due and collectible, at the option of the holder of this note.

If this note is not paid when due we agree to pay all reasonable costs of collection, including attorney's

fees which the Court may adjudge or deem to be reasonable and proper, and also consent that judgment may be entered for these amounts by any Justice of the Peace of proper jurisdiction.

It is hereby expressly agreed and understood that in the event of any suit or action being brought against the maker or makers of this note, dissolution of partnership, retiring from or disposing of business, death, or any loss by fire, the amount then remaining unpaid, together with interest, shall at once become due and payable, and the owner hereof may take immediate action hereon.

For value received each and every person signing or endorsing this note, hereby waives presentment, demand, protest and notice of non-payment thereof, binds himself thereon as principal—not as security—and promises that if suit be brought to collect same or any part thereof, and hereby waiving all the provisions of the deficiency judgment law, and the valuation and appraisement laws of the State of Washington.

RAYMOND BOX CO.
By J. A. HEATH, Pres. [26]
#773. MILES H. LEACH, Sec.

[Endorsed]:

12–19–10. Pd on within $400.00.
12–22–10. " " " 298.29.
12–28–10. " " " 350.00.
Mar. 3–11. Int. pd. to 3–2–11–$449.05.

Mar. 2–11. Bal. Due 22,351.71.
11–29–11. Int. to 10–1–11–1038.11.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jul. 26, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [27]

Stipulation [That Judge Hanford shall Decide Validity of Real Estate Mortgage Claim, etc., on Record Heretofore Made by Petition for Review, etc.].

It is hereby stipulated between A. S. Coats, the Trustee in the above-entitled matter, and the Pacific State Bank, Claimant, by their respective attorneys, that the Honorable C. H. Hanford shall decide the validity of the real estate mortgage claim of the Pacific State Bank against the bankrupt herein, and the validity of the chattel mortgage, claimed by the Pacific State Bank, to be held by it on the property of the said bankrupt, upon the record heretofore made by the Petition for Review of the order of the Referee in Bankruptcy filed herein, allowing the Pacific State Bank to foreclose its mortgage, and that said record and all of it be considered as properly taken before the said judge for such purpose, without further certification.

Provided that any such decision, affecting the validity and preference of said real estate mortgage and chattel mortgage, or either, shall be subject to the right of appeal by either party, and that the mere fact that such decision is made out of its order and in advance of the usual procedure in the allowance of claims, that the same shall not affect such right of appeal and the right of appeal by either party as to

the questions now decided, shall begin to run only from the time of the final allowance of such claim, if the Court shall decide the same to be a preference and such real estate and chattel mortgage legal and valid as against the creditors, it being the intention of both parties by this stipulation simply to save time and further certification, hearing and review, and that the usual rights of appeal shall be in no way affected.

And provided, further, that any decision now made as to the validity of said real estate mortgage and chattel mortgage shall not in any way be regarded as *res judicata* should the said claimant be [28] permitted to enter the State courts to foreclose its said mortgage.

Signed and dated this 22d day of July, 1912.

CHAS. E. MILLER,
Attorney for Trustee.

H. W. B. HEWEN,
HAYDEN & LANGHORNE,
Attorneys for Pac. State Bank.

[Endorsed]: "Filed United States District Court, Western District of Washington. Jul. 25, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [29]

Answer of Creditors to Petition of the Pacific State Bank.

Comes now the following named creditors, namely, Pacific Transportation Company, Raymond Transfer & Cold Storage Company, Cram Lumber Company, Raymond Foundry & Machine Company, Bell

Brothers Hardware Company, Siler Mill Company, Willapa Lumber Company, W. W. Wood Company, Pierce Brothers, J. E. Gardner, Standard Tow Boat Company, Case Shingle & Lumber Company, Quinault Lumber Company, Lebam Mill & Timber Company, Fern Creek Lumber Company, Gus Bacopolus, Mike Daniel, Victor Agren, Wm. A. Clark, Jim Hamalas, Gus Pansgas, Abe Taylor, F. H. Hesmer, L. E. Owens, Miles H. Leach, John Chepas, E. M. Hatch, Chas. Herman, Ethel Owens, J. A. Schultz, R. N. Skinner, Strat Nelson, Joseph Hatch, H. F. Klimmer, L. H. Osborne, Jim Jamison, E. Norwick, Frank Walan, James Argeris, Arthur Bailey, Frank Sholes, Ben Vanderflow and Ed Leacock, and answering the petition of the Pacific State Bank filed in the above-entitled matter, admit, allege, and deny as follows:

I.

Said answering creditors admit paragraphs number one, two and three of said petition.

III.

Answering paragraph number four of said petition these answering creditors deny each and every allegation contained in paragraph four of said petition, and the whole thereof, excepting they admit that said bankrupt made and delivered to petitioner on or about December 2d, 1910, an instrument a copy of which is attached to petitioner's petition, and marked Exhibit "A," and that the said instrument was recorded at the times and places stated in said paragraph, but answering creditors deny that said instru-

ment was [30] ever recorded as a chattel mortgage or in any chattel mortgage record.

III.

These answering creditors, answering paragraph number five of said petition, allege that they have no knowledge or information sufficient to form a belief as to the truth or falsity of any of the allegations contained in said paragraph, and therefore on their information and belief they deny the same, and put the said petitioner upon its proof.

IV.

These answering creditors deny each and every allegation contained in paragraph six of said petition, excepting they admit that in said Exhibit "A" that the property covered thereby consists of real and personal property, and that the same constitutes a manufacturing plant for the manufacture of boxes, and that in said plant there is a large amount of machinery and equipment installed therein.

V.

These answering creditors deny each and every allegation contained in paragraph number seven of said petition and the whole thereof.

VI.

Said answering creditors deny that petitioner's claim is a first mortgage and prior lien upon said property, or any part of said property, or that the same is a lien whatever on said property, or that the same is a lien at all in so far as these answering creditors are concerned. These answering creditors deny that petitioner has a first mortgage and prior lien, or

that it has any lien prior to the claims of these answering creditors or any of them. These answering creditors deny that the said instrument is a lien, [31] whatever, upon the property of said bankrupt, prior to the claims of any of these answering creditors.

VII.

These answering creditors, answering paragraph number nine of said petition, deny each and every allegation contained in said paragraph number nine and the whole thereof.

For a further separate answer and defense unto petitioner's petition, these answering creditors aver as follows:

I.

That the Pacific Transportation Company is now and was at all of the times hereinafter in this answer mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and that it has paid its annual license fee last due to the State of Washington, and is entitled to defend suits or actions at law or equity in the courts of the United States and in the State of Washington.

That the Cram Lumber Company is now and was at all of the times hereinafter in this answer mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and that it has paid its annual license fee last due to the State of Washington, and is entitled to defend suits or actions at law or equity in the

courts of the United States and in the State of Washington.

That the Siler Mill Company is now and was at all of the times hereinafter in this answer mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and that it has paid its annual license fee last due to the State of Washington, and is entitled to defend suits or actions [32] at law or equity in the courts of the United States and in the State of Washington.

That the Willapa Lumber Company is now and was at all of the times hereinafter in this answer mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and that it has paid its annual license fee last due to the State of Washington, and is entitled to defend suits or actions at law or equity in the courts of the United States and in the State of Washington.

That the W. W. Wood Company is now and was at all of the times hereinafter in this answer mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and that it has paid its annual license fee last due to the State of Washington, and is entitled to defend suits or actions at law or equity in the courts of the United States and in the State of Washington.

That the Lebam Mill & Timber Company is now and was at all of the times hereinafter in this answer mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and that it has paid its annual license fee last due to the State of Washington, and is en-

titled to defend suits or actions at law or equity in the courts of the United States and in the State of Washington.

That the Case Shingle & Lumber Company is now and was at all of the times hereinafter in this answer mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and that it has paid its annual license fee last due to the State of Washington, and is entitled to defend suits or actions at law or equity in the courts of the United States and in the State of Washington. [33]

II.

That at all the times hereinafter mentioned the Raymond Box Company, the bankrupt herein, was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington, and has its principal place of business at Raymond, Pacific County, Washington, and which said last named corporation was, on or about the —— day of ————, 1912, adjudged bankrupt by this court.

III.

That subsequent to December 2d, 1910, the said Raymond Box Company, the bankrupt herein, and prior to the time that it was adjudged a bankrupt, became indebted to and now is owing and indebted to these answering creditors in the sums of money set opposite their respective names as follows, to wit:

Pacific Transportation Company.....$160.77
Raymond Transfer & Cold Storage Company 31.55
Cram Lumber Company..... .291.49
Raymond Foundry & Machine Company.... 229.50

Bell Brothers Hardware Company..... 75.12
Siler Mill Company..... 167.13
Willapa Lumber Company.....2015.64
W. W. Wood Company.....2534.22
Pierce Brothers.....2019.13
J. E. Gardner..... 620.46
Standard Tow Boat Company..... 32.00
Case Shingle & Lumber Company..... 519.14
Quinault Lumber Company..... 76.39
Lebam Mill & Timber Company..... 114.95
Fern Creek Lumber Company..... 307.53
Gus Bacopolus..... 15.90
Mike Daniel..... 22.80
Victor Agren..... 149.00
Wm. A. Clark..... 74.50
Jim Hamalas..... 22.85
Gus Pansgas..... 23.50
Abe Taylor..... 22.96
F. H. Hesmer..... 24.50
L. E. Owens..... 133.50
Miles H. Leach..... 41.44
John Chepas..... 18.48
E. M. Hatch..... 183.30
Chas. Herman..... 32.47
Ethel Owens..... 17.50
J. A. Schultz..... 17.90
R. N. Skinner..... 16.38
Strat Nelson..... 16.13
Joseph Hatch..... 33.09

[34]

H. F. Klimmer..... 13.10
L. H. Osborne..... 20.65
Jim Jamison..... 16.20

E. Norwick..... 13.97
Frank Walan..... 24.90
James Argeris..... 27.20
Arthur Bailey..... 17.88
Frank Sholes..... 29.35
Ben Vandeflow..... 115.05
Ed Leacock..... 17.35

And the amount set opposite the respective names of these answering creditors is due and owing to each of said creditors, and no part thereof has ever been paid, and each of said creditors has filed his claim herein in this bankruptcy proceeding for the same, and said claim is now on file herein.

IV.

That neither one of said answering creditors herein ever had any actual notice that said Raymond Box Company ever executed or delivered to said Pacific State Bank the promissory note of the instrument which said Pacific State Bank alleges to be a mortgage, until after said Raymond Box Company became owing and indebted to each of these answering creditors.

V.

That on December 2d, 1910, long prior thereto, and ever since said time, the laws of the State of Washington provided as follows, to wit:

That "certificates of acknowledgment of an instrument acknowledged by a corporation substantially in the following form shall be sufficient:

State of ———,
County of ———,—ss.

On this —— day of ————, A. D. 190—, before me personally appeared ————, to me known to

be the (president, vice-president, secretary, treasurer, or other authorized officer or agent, as the case may be) of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on [35] oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

(Signature and title of officer.)"

And the said laws are found on page 245 of the Session Laws of the State of Washington, for 1903.

VI.

That on and prior to December 2, 1910, and ever since said date the laws of the State of Washington provided and were as follows, to wit:

Sec. 3660. "A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchaser, and encumbrancers of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property."

Sec. 3668. "A mortgage of personal property must be recorded in the office of the county auditor of the county in which the mortgaged

property is situated, in a book kept exclusively for that purpose."

VII.

That the said mortgage which the petitioner, Pacific State Bank, now seeks the leave of this Court to foreclose, a copy of which mortgage is attached to the said petition of said Pacific State Bank, marked Exhibit "A" and made a part thereof, is invalid and void, is not a lien upon the premises and property of the bankrupt therein described, the same gives no preference rights to the said Pacific State Bank, and is void, and the said Pacific State Bank is without lawful right to enforce the same as a preferred claim against said bankrupt estate, for the following reasons:

(a) The said alleged mortgage, Exhibit "A," was never completely executed by the bankrupt, and is not the mortgage of the bankrupt under the laws of the State of Washington, the facts of which will more fully hereinafter appear. [36]

(b) The said mortgage was not executed and acknowledged in accordance with the laws of the State of Washington, was not entitled to registration under the laws of the State of Washington, and the said petitioner acquired neither lien nor right, whatsoever, in the property described therein by virtue of said mortgage, and it is not entitled to foreclose the same.

That the said mortgage, as will more fully appear by inspection of the copy thereof, was not acknowledged, substantially or otherwise, as required by law; that a certificate of H. W. B. Hewen as a Notary Public of the State of Washington, purporting to be

a certificate of acknowledgment, is attached to said mortgage, but that it does not appear from said certificate that the said J. A. Heath and Miles H. Leach were known to the said notary public to be the president and secretary, respectively, of said bankrupt corporation; that it does not appear from said acknowledgment that they, the said officers, acknowledged the said instrument to be the free and voluntary act and deed of said corporation, nor that it was the free and voluntary act and deed of said corporation for the uses and purposes in said alleged mortgage mentioned; nor that the said J. A. Heath and Miles H. Leach stated on oath that they were authorized to execute said instrument, nor does it appear from said certificate of acknowledgment that the said J. A. Heath and Miles H. Leach on oath stated that the seal affixed was, in fact, the genuine corporate seal of said bankrupt corporation; nor does said purported certificate of acknowledgment contain any words or statements equivalent to those prescribed by said statute, nor does said purported certificate of acknowledgment substantially, or in any other manner, comply with the requirements of said statute, or any of the laws of the State of Washington, and the said purported certificate of acknowledgment is a mere nullity and of no greater weight than if no certificate [37] of acknowledgment at all had been attached to said alleged mortgage; that the laws of the State of Washington require that all conveyances of real estate, or of any interest therein, and all contracts creating or evidencing any incumbrance on real estate, shall be by deed, and that such deed shall be in writing, signed by the party bound

thereby, and acknowledged by the party making it before some person authorized by the laws of said State to take the acknowledgment of deeds, and that although the said alleged mortgage purports to have been recorded in the real estate records of mortgages, the same was not entitled to be recorded, and the said purported mortgage is to all legal intents and purposes an unrecorded, incomplete instrument.

VIII.

That by reason of the requirements of said Chapter 132 of the Session Laws of Washington for 1903, page 245, the sworn deposition of the officer or officers seeking to execute a mortgage upon the property of a corporation must be incorporated in the certificate of acknowledgment endorsed upon or attached to such mortgage, as a part of the execution of such mortgage, and that such mortgage is not complete until such deposition is made, taken and recorded in such certificate of acknowledgment; and that because the persons purporting to be the president and secretary of said corporation and signing said alleged mortgage, did not give their depositions that they were authorized by such corporation to make such mortgage, and that the seal alleged to be attached to such mortgage was, in fact, the genuine seal of such corporation; this respondent shows that the execution of said mortgage was not consummated as attempted, the same is no mortgage at all, and is not a lien for any purpose upon the property therein described.

IX.

That the indebtedness set forth in the note attempted [38] be secured by said alleged mortgage

was not originally incurred upon the day of the date of said mortgage; that the said amount of indebtedness set forth in said note is the aggregate of divers loans and discounts made by said petitioner to the said bankrupt at various times, and long prior to said December 2, 1910, which said previous indebtedness so incorporated in said note and attempted to be secured by said alleged mortgage prior to the date of said note was not secured by mortgage upon any of the property of the said bankrupt, if the same was secured at all, and that at the time of the making of said note, to wit, on December 2, 1910, the said bankrupt was indebted to the said petitioner as it had been for a long time previous thereto, as these creditors are informed and believe, and charge the truth to be, in a sum in excess of twenty thousand dollars; that the said H. W. B. Hewen, the officer whose name is appended to said certificate of acknowledgment and whose acts the same purports to certify and perpetuate, was at the time of the execution of said note and the attempted making and execution of said mortgage, and had been for a long time prior thereto, a stockholder of and in the said petitioner, Pacific State Bank, the same being a corporation organized, created and carrying on business under and by virtue of the laws of the State of Washington; that the said H. W. B. Hewen, as such stockholder in said petitioner corporation, was beneficially interested in the mortgage so sought to be made and executed to the petitioner by the said bankrupt, and would profit thereby in the proportion of the amount of stock held by him to the entire capital stock of said petitioner corporation, and it was not competent

nor permissible nor lawful for the said H. W. B. Hewen, being so materially interested, as aforesaid, to take and receive such acknowledgment, nor to make and record the same, and by reason of such interest of said notary public the said certificate was invalid and void. [39]

IX½.

That said instrument is also void and does not constitute any lien on the property of said bankrupt as against these answering creditors, for the reason that said instrument was not recorded in the office of the Auditor of Pacific County, Washington, as a chattel mortgage, nor in a book kept in said county Auditor's office, exclusively for that purpose; and because said instrument was not recorded as a chattel mortgage at all, the same having been recorded in the record of real estate mortgages in the office of the Auditor of said Pacific County, Washington, but was never recorded in any book kept for chattel mortgages or used for the recording of chattel mortgages in the office of the Auditor of said county at all, for that chattel mortgage must, under the laws of the State of Washington, be recorded in a book kept exclusively for that purpose, and recording such chattel mortgage or instrument purporting to be a chattel mortgage in the real estate records in the office of the Auditor in the county wherein such property is situated is not, under the laws of the State of Washington, actual or constructive notice to creditors of the mortgage or subsequent purchasers, and said instrument does not afford, under the laws of the State of Washington, constructive notice of any lien on the

personal property of said mortgagor, and is void as to these answering creditors of said bankrupt.

IX½.

That said mortgage or the execution thereof was not authorized by either the Board of Trustees or Stockholders of said Raymond Box Co.

X.

That none of the claims or the sums due to any of these answering creditors are secured, but each of the same is an unsecured claim and indebtedness against said bankrupt corporation.

XI.

That the whole of the indebtedness of said corporation, [40] including the amount of the indebtedness of these answering defendants, amounts to the sum of about $36,902.00; that if the claim of the Pacific State Bank, petitioner, is held to be a first lien upon the properties of said bankrupt corporation, and if the property is now sold to satisfy said pretended mortgage of said Pacific State Bank, then there will be nothing left for these creditors or any of them, but if the property is not sold, and if the claim of the said Pacific State Bank is not held to be a first lien or any lien upon said property of said bankrupt, then these answering creditors will receive at least some part or portion of the sum due them; but if the claim of the Pacific State Bank is held to be a first and prior lien, or held to be a lien at all upon the property of said bankrupt, and the property is sold to satisfy the same, then there will not be sufficient funds to pay the costs of the bankruptcy

proceedings, nor any of the claims of these creditors.

XII.

These answering creditors further aver, that H. W. B. Hewen, who purports to have taken the acknowledgment to said pretended mortgage of the Pacific State Bank was, prior to and at the time of the taking of said acknowledgment, to wit, on December 2d, 1910, ever since has been and now is, a stockholder in the said Pacific State Bank, and beneficially interested therein; and these answering creditors aver that for that reason that the said H. W. B. Hewen was not qualified to take an acknowledgment to an instrument purporting to give unto said Pacific State Bank a mortgage upon this property of the bankrupt.

WHEREFORE, these answering creditors pray that the petition of the Pacific State Bank be denied; that the instrument which is attached to said petition and marked Exhibit "A" be declared [41] void and of no avail, as against these answering creditors, and that the same be held and adjudged not to be a lien upon the property of any of the property of the bankrupt, and that the said claim of the Pacific State Bank be held and adjudged not to be prior or superior to the claim or any of the claims of these answering creditors, and that the claims of these answering creditors be held to be entitled to payment the same as the claim of the Pacific State Bank, and that said instrument of the Pacific State Bank be held not to be a mortgage, or a lien upon any of the property of said bankrupt.

These answering creditors further pray that this court make and enter herein such other, further and separate order as may be lawful, just and equitable.

WELSH & WELSH,
Attorneys for Answering Creditors.

State of Washington,
County of Pacific,—ss.

I, Martin C. Welsh, being first duly sworn, upon my oath do depose and say, that I am one of the trustees and am also the treasurer of the W. W. Wood Company, which is a corporation of the State of Washington, and is one of the answering creditors herein; that I am authorized by the Board of Trustees of said corporation to make this verification for and on behalf of said corporation; that I have read the above and foregoing answer and know the contents thereof, and the same and the whole thereof is true, as I verily believe, and that I make this verification for and on behalf of said W. W. Wood Company, and also for and on behalf of the co-answering creditors.

MARTIN C. WELSH. [42]

Subscribed in my presence and sworn to before me this 17th day of April, A. D. 1912.

[Seal] JOHN T. WELSH,
Notary Public for the State of Washington, Residing at South Bend in Said State.

Due and legal service of the within answer is admitted by copy received April 19, 1912.

H. W. B. HEWEN,
HAYDEN & LANGHORNE,
Attorneys for Pacific State Bank.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Apr. 19, 1912. A. W. Engle, Clerk. By James C. Drake, Deputy." [43]

Return of Trustee in Bankruptcy.

To the Honorable Judges of the Above-named Court, and to the Honorable WARREN A. WORDEN, Referee in Bankruptcy:

Comes now A. S. Coates, the Trustee in Bankruptcy in the above-entitled matter, and for cause why the petition of the Pacific State Bank for leave to foreclose its certain alleged mortgage on the real and personal property of the bankrupt herein should not be granted, respectfully shows as follows:

I.

This respondent, trustee as aforesaid, respectfully shows unto the Court that the said mortgage which the petitioner, Pacific State Bank, now seeks the leave of this Court to foreclose, a copy of which mortgage is attached to the said petition of said Pacific State Bank, marked Exhibit "A" and made a part thereof, is invalid and void, is not a lien upon the premises and property of the bankrupt therein described, the same gives no preference rights to the said Pacific State Bank, and is void, and the said Pacific State Bank is without lawful right to enforce the same as a preferred claim against said bankrupt estate, for the following reasons: [44]

(a) The said alleged mortgage, Exhibit "A," was never completely executed by the bankrupt, and is not the mortgage of the bankrupt under the laws of

the State of Washington, the facts of which will more fully hereinafter appear.

(b) The said mortgage was not executed and acknowledged in accordance with the laws of the State of Washington, was not entitled to registration under the laws of the State of Washington, and the said petitioner acquired neither lien nor right whatsoever, in the property described therein by virtue of said mortgage, and it is not entitled to foreclose the same.

And in support of the two foregoing causes, so shown by this trustee, he states and alleges, as true, the following facts:

That the said mortgage purports to be executed by J. A. Heath as President, and Miles H. Leach as Secretary of the bankrupt corporation; that at the time of the making of the said mortgage, to wit, December 2, 1910, the laws of the State of Washington, the same being still in force, provided the form and contents of the acknowledgments of corporation to instruments executed and acknowledged by corporations, the same being Chapter 132 of the Session Laws of Washington for 1903, page 245, and that such certificate of acknowledgments should be substantially in the following form:

State of ———
County of ———, —ss.

On this —— day of ————, A. D. 190—, before me personally appeared ————, to me known to be the (president, vice-president, secretary, treasurer or other authorized officer or agent, as the case may be) of the corporation that executed the within and

foregoing instrument, and acknowledged the said instrument to be the free and voluntary [45] act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year first above written.

(Certificate and title of officer.)

—that the said mortgage, as will more fully appear by inspection of the copy thereof, was not acknowledged, substantially, or otherwise, as required by law; that a certificate of H. W. B. Hewen, as a notary public of the State of Washington, purporting to be a certificate of acknowledgment, is attached to said mortgage, but that it does not appear from said certificate that the said J. A. Heath and Miles H. Leach were known to the said notary public to be the President and Secretary, respectively, of said bankrupt corporation; that it does not appear from said acknowledgment that they, the said officers, acknowledged the said instrument to be the free and voluntary act and deed of said corporation, nor that it was the free and voluntary act and deed of said corporation for the uses and purposes in said alleged mortgage mentioned; nor that the said J. A. Heath and Miles H. Leach stated on oath that they were authorized to execute said instrument, nor does it appear from said certificate of acknowledgment that the said J. A. Heath and Miles H. Leach on oath stated that

the seal affixed was, in fact, the genuine corporate seal of said bankrupt corporation; nor does said purported certificate of acknowledgment contain any words or statements equivalent to those prescribed by said statute, nor does said purported certificate of acknowledgment substantially, or in any other manner, comply with the requirements [46] of said statute, or any of the laws of the State of Washington, and the said purported certificate of acknowledgment is a mere nullity and of no greater weight than if no certificate of acknowledgment at all had been attached to said alleged mortgage; that the laws of the State of Washington require that all conveyances of real estate, or of any interest therein, and all contracts creating or evidencing any incumbrance on real estate, shall be by deed, and that such deed shall be in writing, signed by the party bound thereby, and acknowledged by the party making it before some person authorized by the laws of said state to take the acknowledgment of deeds, and that although the said alleged mortgage purports to have been recorded, the same was not entitled to be recorded and the said purported mortgage is to all legal intents and purposes an unrecorded, incomplete instrument.

II.

This respondent, trustee as aforesaid, further respectfully shows that by reason of the requirements of said chapter 132 of the Session Laws of Washington for 1903, page 245, the sworn deposition of the officer or officers seeking to execute a mortgage upon the property of a corporation must be incorporated in the certificate of acknowledgment endorsed upon

or attached to such mortgage, as a part of the execution of such mortgage, and that such mortgage is not complete until such deposition is made, taken and recorded in such certificate of acknowledgment; and that because the persons purporting to be the president and secretary of said corporation and signing said alleged mortgage, did not give their depositions that they were authorized by such corporation to make such mortgage, and that the seal alleged to be attached to such mortgage, was, in [47] fact, the genuine seal of such corporation; this respondent shows that the execution of said mortgage was not consummated as attempted, the same is no mortgage at all, and is not a lien for any purpose upon the property therein described.

III.

This respondent, trustee as aforesaid, further respectfully shows, that the indebtedness set forth in the note attempted to be secured by said alleged mortgage was not originally incurred upon the day of the date of said mortgage; that the said amount of indebtedness set forth in said note is the aggregate of divers loans and discounts made by said petitioner to the said bankrupt at various times, and long prior to said December 2, 1910, which said previous indebtedness so incorporated in said note and attempted to be secured by said alleged mortgage prior to the date of said note was not secured by mortgage upon any of the property of the said bankrupt, if the same was secured at all, and that at the time of the making of said note, to wit, on December 2, 1910, the said bankrupt was indebted to the said petitioner as it had been for a long time previous thereto, as

this respondent is informed and believes and charges the truth to be, in a sum in excess of twenty thousand dollars; that the said H. W. B. Hewen, the officer whose name is appended to said certificate of acknowledgment and whose acts the same purports to certify and perpetuate, was at the time of the execution of said note and the attempted making and execution of said mortgage, and had been for a long time prior thereto, a stockholder of and in the said petitioner, Pacific State Bank, the same being a corporation organized, created and carrying on business under and by virtue [48] of the laws of the State of Washington; that the said H. W. B. Hewen, as such stockholder in said petitioner corporation, was beneficially interested in the mortgage so sought to be made and executed to the petitioner by the said bankrupt, and would profit thereby in the proportion of the amount of stock held by him to the entire capital stock of said petitioner corporation, and it was not competent nor permissible nor lawful for the said H. W. B. Hewen, being so materially interested, as aforesaid, to take and receive such acknowledgment, nor to make and record the same, and by reason of such interest of said notary public the said certificate was invalid and void.

IV.

This respondent, trustee as aforesaid, further respectfully shows that a large portion of the property described in the said alleged mortgage consists of machinery, implements, furniture, movable fixtures and other personal property not a part of the realty, and that fully one-half of the property in value,

sought to be covered and incumbered by said mortgage is personal property and not realty; that section 3660 of Rem. & Bal. Codes of the State of Washington provides that a mortgage of personal property is void as against creditors of the mortgagor unless the same is acknowledged and recorded in the same manner as is required by law in conveyances of real property; that the said mortgage was on December 8, 1910, recorded as a real estate mortgage in Book 30 of Mortgages, page 31 of the records of said Pacific County, as stated in said petition herein; that because said mortgage was without a lawful certificate of acknowledgment the same was not entitled to be recorded as a chattel mortgage; and that, as a matter of fact and in truth, the said petitioner, Pacific State Bank, has never recorded the [49] said mortgage as a chattel mortgage, as required by the statute above referred to, and the said mortgage is wholly inoperative, ineffective and void as to the personal property and property other than realty therein described.

V.

This respondent, trustee as aforesaid, further respectfully shows, and reference is also had to the schedule of property, list of creditors, etc., of the bankrupt, filed in this court, that at the time of the adjudication of bankruptcy herein, the said bankrupt was indebted to sundry and divers persons upon notes, acceptances, open accounts and otherwise in the sum of $13,102.19, outside of and aside from any and all indebtedness claimed in favor of the petitioner, Pacific State Bank, all of which said claims are unsecured, and that the total indebtedness of

said bankrupt amounts to the sum of more than $36,902.17; that all of said unsecured indebtedness and indebtedness to others than the petitioner, was incurred by said bankrupt and accrued since and after December 2, 1910; and that respondent is informed and believes, and he charges the truth to be, that all of the said unsecured creditors became such creditors subsequent to December 2, 1910; that they, the said creditors, collectively or individually, did not have actual notice, constructive notice, or any notice at all at the several times upon which they became such creditors, of the existence of said alleged mortgage; that from and after December 2, 1910, the said petitioner, Pacific State Bank, claimed to have and hold a chattel mortgage upon said property, and during all of said period while said bankrupt was contracting additional debts, and up to the present time, the said petitioner failed and has failed to record said chattel mortgage in the manner required [50] by law, and the statute referred to in paragraph four hereof; and this respondent therefore shows and alleged that as against such subsequent and unsecured creditors the said alleged mortgage is invalid, and that in proof of the facts herein stated certain of said unsecured creditors have filed with this respondent their affidavits, which are attached to this return, marked Exhibits "A," "B," "C," "D," "E," "F," "G," and "H," and the same are made a part hereof.

VI.

This respondent, trustee as aforesaid, further respectfully shows that, prudently handled and reasonable time being permitted, the real and personal

property comprising the assets and estate of said bankrupt can be sold for an amount sufficient to pay all claims against said estate, and the costs of administering the same, but that in order to accomplish this object entire harmony of effort among the several creditors of said estate is absolutely necessary; that said petitioner, Pacific State Bank, is a creditor to the amount of nearly two-thirds of the entire liabilities of said bankrupt; that if said petitioner is permitted, under the order of this Court, to foreclose its alleged mortgage, the said petitioner will be concerned only in securing upon such sale an amount sufficient for its own purposes and no more, and the burden will be upon the said other and unsecured creditors not only to secure a purchaser willing to pay the amount of said alleged mortgage debt, but an amount sufficiently in excess of such alleged mortgage debt to pay the expenses of administration, the claims for labor and an amount in addition to be paid on their own claims sufficient to warrant their personal efforts in that direction; and that if said petitioner, Pacific State Bank, is [51] permitted to foreclose its alleged mortgage and to sell said property to satisfy its claim, this respondent avers that, owing to the present general unsettled financial condition of the country, an amount greater than said alleged mortgage indebtedness will not be obtained, and there will not be a dollar of surplus to pay the expenses of administration, attorneys' fees, labor claims or said unsecured claims.

VII.

This respondent, trustee as aforesaid, further re-

spectfully shows that the nature of the property comprising the bankrupt estate, as an inspection of the description thereof in said alleged mortgage will show, is not such as will deteriorate in value by nonuse to any material or even appreciable extent, and the loss from said property and machinery lying idle for a few months should have no weight in the consideration of said petition; that with proper care from the caretaker, no material damage can result to said property from idleness and there are no expenses to be incurred for rents or operating expenses; that the general lumber business and the financial times, generally, for the past four or five years, have been at a low ebb, but that there is now a noticeable improvement therein, and this respondent believes and submits, as a matter of general observation, that after the national nominating conventions in June shall have been held business conditions in the United States will so radically and materially improve that the value of the said bankrupt estate in six months from now will be very much greater than at any time during the next two months, and this respondent, after a long experience in the wood product business, respectfully tenders his belief and conviction that a sale of the property of said estate in the near future will be detrimental [52] to the interest of the creditors and ill-advised.

VIII.

This respondent, trustee as aforesaid, further respectfully shows, that he makes this return and protests against the granting and allowing of the said petition of the said Pacific State Bank for the leave

of this Court to foreclose its said alleged mortgage, not only as trustee of the said bankrupt and as the official representative of the unsecured creditors of said bankrupt, in the general discharge of the duties required of him by law, but, also, especially, by, at and upon the personal request of a considerable majority of the unsecured creditors of said bankrupt.

WHEREFORE: this respondent prays that the said petition of the said Pacific State Bank for leave to foreclose its said alleged mortgage be denied and overruled, to the end that, ultimately, the said petitioner shall be required to participate in the assets of said estate to the same extent and upon the same footing as the other unsecured creditors, only.

A. S. COATS,
Trustee. [53]

State of Washington,
County of Pacific,—ss.

A. S. Coates being duly sworn, according to law, deposes and says as follows:

1. That he is the duly elected, qualified and acting trustee in bankruptcy of the within entitled bankrupt estate.

2. That he has read the foregoing return to the said order of this Court to show cause, subscribed by him; that he knows the contents thereof, and that the facts therein stated are true, excepting as to such matters as are stated upon his information and belief, and as to such matters he believes the same to be true.

A. S. COATS.

Subscribed and sworn to before me this 17th day of April, A. D. 1912.

[Seal] F. D. COUDEN,

Notary Public for the State of Washington, Residing at Raymond in Said County.

CHAS. E. MILLER,
Attorney for Trustee, South Bend, Wash.

[54]

Exhibit "A" [to Return of Trustee].

In the United States District Court, for the Western District of Washington, Southern Division.

In the Matter of the RAYMOND BOX COMPANY, Bankrupt.

Affidavit of Samuel McMurran.

State of Washington,
County of Pacific,—ss.

Samuel McMurran, being first duly sworn, upon oath deposes and says: That he is a resident of Raymond, Pacific County, Washington; that he is employed as bookkeeper for the W. W. Wood Company of this city; that he has had 25 years' experience as a bookkeeper.

That on or about the 15th day of February, 1912, A. S. Coats, who was then temporary receiver for the Raymond Box Company, delivered to him all the books, statements, checks, accounts and records of the Raymond Box Company, and requested that he audit the books and prepare a statement, and that thereafter he did examine and audit said books and accounts of the Raymond Box Company, and from the audit so made, found, and now finds that the pur-

ported mortgage now held by the Pacific State Bank, and which the bank alleges was given by the Raymond Box Company to secure a note in the sum of $23,400.00 was given and dated on December 2, 1910, and was given for a pre-existing debt.

That at the time said purported mortgage was given as aforesaid, the amount due thereon was the only sum which the Raymond Box Company then owed and at that time it had no indebtedness whatever, except the amount due on said note and purported mortgage, and all of the accounts which it now owes and which was owing at the time it was adjudicated a bankrupt, have been created since the execution of said instrument, and said accounts in addition to the amount due to said bank, amount in the aggregate to about $14,000.00.

That all of the creditors shown on the statement filed in the above proceedings by A. S. Coats and all of the creditors which have presented claims in the above-entitled matter, became creditors of the Raymond Box Company after the execution of said purported mortgage. **[55]**

SAMUEL McMURRAN.

Subscribed and sworn to before me this 15th day of April, A. D. 1912.

[Seal] MARTIN C. WELSH,
Notary Public in and for the State of Washington,
Residing at Raymond, Washington. **[56]**

Exhibit "B" [to Return of Trustee].

In the United States District Court, for the Western District of Washington, Southern Division.

In the Matter of the RAYMOND BOX COMPANY, Bankrupt.

Affidavit of Miles Leach.

State of Washington,
County of Pacific,—ss.

Miles Leach, being first duly sworn, upon his oath deposes and says: That he now is, and at all the times hereinafter mentioned, has been the secretary of the Raymond Box Company, the above named bankrupt; that he is familiar with the books of said bankrupt and with the amount due and owing the various creditors and knows approximately the date and the indebtedness due each creditor was contracted.

That on or about the 2d day of December, 1910, said Raymond Box Company became indebted to the Pacific State Bank of South Bend, Washington, in the sum of $23,400.00, which is the same indebtedness which the Pacific State Bank, aforesaid, claims is secured by the said instrument, which said bank alleges to be mortgage, and which is attached to its petition in the above-entitled cause, wherein it asks permission to foreclose said purported mortgage.

That at the time said bankrupt became indebted to said bank as aforesaid, it was not indebted to any other person, firm or corporation, and all of the indebtedness which it now owes and which it owed at

the time of the adjudication of bankruptcy, was contracted after the execution of said instrument, which the Pacific State Bank is attempting to foreclose as a mortgage, and all of the creditors which are now creditors of said bankrupt, became such creditors after the execution of said instrument.

MILES H. LEACH.

Subscribed and sworn to before me this 13th day of April, A. D. 1912.

[Seal] MARTIN C. WELSH,
Notary Public in and for the State of Washington,
Residing at Raymond in Said State. [57]

Exhibit "C" [to Return of Trustee].

In the United States District Court, for the Western District of Washington, Southern Division.

In the Matter of the RAYMOND BOX COMPANY, Bankrupt.

Affidavit of Ralph Gerber.

State of Washington,
County of Pacific,—ss.

Ralph Gerger, being first duly sworn, upon his oath deposes and says: That he is now and during all the times hereinafter mentioned, has been the manager of the Raymond Foundry & Machine Company, one of the creditors of the Raymond Box Company, Bankrupt

That the indebtedness due said Raymond Foundry & Machine Company was contracted long after the 2d day of December, 1910, and at the time said debt was contracted and the credit extended to the Ray-

mond Box Company, said Raymond Foundry & Machine Company, did not have, nor neither did any of its agents have any actual knowledge that the Pacific State Bank claimed to have a mortgage on the property of said Raymond Box Company.

RALPH GERBER.

Subscribed and sworn to before me this 13th day of April, A. D. 1912.

[Seal] MARTIN C. WELSH,
Notary Public in and for the State of Washington,
Residing at Raymond in Said State. [58]

Exhibit "D" [to Return of Trustee].

In the United States District Court, for the Western District of Washington, Southern Division.

In the Matter of the RAYMOND BOX COMPANY, Bankrupt.

Affidavit of W. S. Cram.

State of Washington,
County of Pacific,—ss.

W. S. Cram, being first duly sworn, upon his oath deposes and says: That he now is and during all the times hereinafter mentioned has been the secretary of the Siler Mill Company, one of the creditors of the Raymond Box Company, Bankrupt. That the indebtedness due said Siler Mill Company was contracted long after the 2d day of December, 1910, and at the time said debt was contracted and the credit extended to the Raymond Box Company, said Siler Mill Company did not have, nor neither did any of its agents have any actual knowledge that the Pa-

cific State Bank claimed to have a mortgage on the property of said Raymond Box Company.

W. S. CRAM.

Subscribed and sworn to before me this 13th day of April, A. D. 1912.

[Seal] MARTIN C. WELSH,
Notary Public in and for the State of Washington,
Residing at Raymond in Said State. **[59]**

Exhibit "E" [to Return of Trustee].

In the United States District Court, for the Western District of Washington, Southern Division.

In the Matter of the RAYMOND BOX COMPANY, Bankrupt.

Affidavit of F. C. Schoemaker.

State of Washington,
County of Pacific,—ss.

F. C. Schoemaker, being first duly sworn, upon his oath deposes and says: That he now is, and during all the times hereinafter mentioned, has been the secretary of the Willapa Lumber Company, one of the creditors of the Raymond Box Company, Bankrupt. That the indebtedness due said Willapa Lumber Company was contracted long after the 2d day of December, 1910, and at the time said debt was contracted and the credit extended to the Raymond Box Company, said Willapa Lumber Company did not have, nor neither did any of its agents have any actual knowledge that the Pacific State Bank claimed to have a mortgage on the property of said Raymond Box Company.

F. C. SCHOEMAKER.

Subscribed and sworn to before me this 13th day of April, A. D. 1912.

[Seal] MARTIN C. WELSH,
Notary Public in and for the State of Washington,
Residing at Raymond in Said State. [60]

Exhibit "F" [to Return of Trustee].

In the United States District Court, for the Western District of Washington, Southern Division.

In the Matter of the RAYMOND BOX COMPANY, Bankrupt.

Affidavit of A. S. Coats.

State of Washington,
County of Pacific,—ss.

A. S. Coats, being duly sworn, upon his oath deposes and says: That he now is and at all the times hereinafter mentioned has been the manager of the W. W. Wood Company, one of the creditors of the Raymond Box Company, Bankrupt. That the indebtedness due said W. W. Wood Company was contracted long after the 2d day of December, 1910, and at the time said debt was contracted and the credit extended to the Raymond Box Company, said W. W. Wood Company did not have, nor neither did any of its agents have any actual knowledge that the Pacific State Bank claimed to have a mortgage on the property of said Raymond Box Company.

A. S. COATS.

Subscribed and sworn to before me this 13th day of April, A. D. 1912.

[Seal] MARTIN C. WELSH,
Notary Public in and for State of Washington, Residing at Raymond, Wash. [61]

Exhibit "G" [to Return of Trustee].

In the United States District Court, for the Western District of Washington, Southern Division.

In the Matter of the RAYMOND BOX COMPANY, Bankrupt.

Affidavit of R. V. Pearce.

State of Washington,
County of Pacific,—ss.

R. V. Pearce, being first duly sworn, upon his oath deposes and says: That he is a member of the firm of Pearce Bros., one of the creditors of the Raymond Box Company, the above-named bankrupt, and that Pearce Bros. have presented their claim and filed the same in said bankruptcy proceedings; that the indebtedness due Pearce Bros. by the Raymond Box Company was contracted long after the 2d day of December, 1910, and at the time said indebtedness was contracted, affiant did not know, and neither did any member of the firm of Pearce Bros. know that the Pacific State Bank of South Bend, Washington, claimed to hold a mortgage on the property of the Raymond Box Company, but on the contrary, before the credit was extended to the Raymond Box Company, affiant knew that the Raymond Box Company was banking with the Pacific State Bank and affiant interviewed Lester Homan, the cashier of said bank

and advised with him relative to extending credit to the Raymond Box Company, and Mr. Homan advised affiant that it was perfectly safe.

That at the time that affiant talked with Mr. Homan as above recited, affiant knew absolutely nothing about the financial condition of the Raymond Box Company, and would not have extended it any credit whatever, had it not been for the statements and representations of Mr. Homan, which affiant believed at that time to be true, and he believed that Mr. Homan was in a position to know and did know the financial condition of said bankrupt.

RALPH V. PEARCE.

Subscribed and sworn to before me this 17th day of April, A. D. 1912. [62]

[Seal] MARTIN C. WELSH,
Notary Public in and for the State of Washington,
Residing at Raymond in Said State. [63]

Exhibit "H" [to Return of Trustee].

In the United States District Court, for the Western District of Washington, Southern Division.

In the Matter of the RAYMOND BOX COMPANY, Bankrupt.

Affidavit of T. H. Bell.

State of Washington,
County of Pacific,—ss.

T. H. Bell, being first duly sworn, upon his oath deposes and says: That he is now and during all the times hereinafter mentioned has been the manager of the Pacific Transportation Company, one of the

creditors of the Raymond Box Company, Bankrupt. That the indebtedness due said Pacific Transportation Company was contracted long after the 2d day of December, 1910, and at the time said debt was contracted and the credit extended to the Raymond Box Company, said Pacific Transportation Company, did not have, nor neither did any of its agents have any actual knowledge that the Pacific State Bank claimed to have a mortgage on the property of said Raymond Box Company.

T. H. BELL.

Subscribed and sworn to before me this 13th day of April, A. D. 1912.

[Seal] MARTIN C. WELSH,
Notary Public in and for the State of Washington,
Residing at Raymond, Wash.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. April 19, 1912. A. W. Engle, Clerk. James C. Drake, Deputy." [64]

Replication to Answer.

The Pacific State Bank, petitioner herein, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the creditors to the petition of the Pacific State Bank, for replication thereunto saith that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said creditors, and that the answer of the said creditors is very uncer-

tain, evasive, and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct, and humbly prays as in and by its said bill it hath already prayed.

H. W. B. HEWEN,
HAYDEN & LANGHORNE,
Solicitors for Petitioner, 408 Perkins Bldg., Tacoma, Wash.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Aug. 27, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [65]

Replication to Return of Trustee.

The Pacific State Bank, petitioner herein, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the return of the trustee to the petition of the Pacific State Bank, for replication thereunto saith that it doth and will aver, maintain and prove its said petition to be true, certain, and sufficient in the law to be answered unto by the said creditors, and that the answer of the creditors is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter

or thing in the said answer contained, material or effectual in the law to be replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

H. W. B. HEWEN,
HAYDEN & LANGHORNE,
Solicitors for Petitioner, 408 Perkins Bldg., Tacoma, Wash.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Aug. 27, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [66]

Affidavit of M. H. Leach.

M. H. Leach, being first duly sworn, on oath says: That he was on the 2d day of December, 1910, the duly elected and qualified secretary of the Raymond Box Company, a corporation, and mortgagor in that certain instrument dated December 2d, 1910, to the Pacific State Bank, a corporation, with its principal place of business at South Bend, Washington;

That at the time of the execution and delivery of said mortgage, the same being in the sum of Twenty-three Thousand Four Hundred ($23,400.00) Dollars, J. A. Heath, who executed said mortgage as president of said corporation, and this affiant, who executed said mortgage as secretary thereof, were the sole trustees of said corporation, and the owners of all of the capital stock thereof;

That the corporate seal attached to said mortgage was and is the authorized corporate seal of the Raymond Box Company, mortgagor, and was affixed to said mortgage by this affiant as secretary thereof.

MILES H. LEACH.

Sworn to and subscribed before me this sixteenth day of April, A. D. 1912.

[Seal] H. W. B. HEWEN,
Notary Public in and for the State of Washington,
Residing at South Bend, in Said State.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Aug. 27, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [67]

In the Superior Court of the State of Washington, in and for the County of Pacific.

ALEXANDER McKENZIE, Administrator of the Estate of EFFIE A. McKENZIE, Deceased,
Plaintiff,

vs.

J. ALBERT HEATH,
Defendant.

Findings of Fact and Conclusions of Law.

Be it remembered that the above-entitled action came on regularly for trial on the 17th day of February, A. D. 1912, in said court, before the Honorable Sol Smith, Judge of said court, the plaintiff being represented by his attorney of record, Fred M. Bond, and the defendant having not appeared in said cause. And that more than 20 days have elapsed since said service of the summons and complaint upon the de-

fendant, which was a personal service at the City of Raymond, Pacific County, Washington, as appears by the files and records in this cause. And the said defendant having been duly defaulted for not appearing or demurring, or answering said complaint, and the Court having taken and heard all of the testimony on the part of the plaintiff, and after being duly advised in the premises, rendered its opinion that the plaintiff was entitled to recover for the sums demanded in his complaint, and directed Findings of Fact and Conclusions of Law to be as follows, to wit:

1.

That the plaintiff is the duly, legally, and qualified administrator of Effie A. McKenzie, deceased, and that he has the right to carry on this action, he being substituted as plaintiff in the name of Effie A. McKenzie as the records now on file in this case more fully show.

2.

That Effie A. McKenzie, the original plaintiff in the above-entitled action, on the 5th day of September, 1910, departed this life at the City of Raymond, Pacific [68] County, Washington, and that prior to her death and at the time of commencing this action she was a *bona fide* resident of said city of Raymond.

3.

That after her death, and, to wit: On the 7th day of November, 1910, the above-named administrator, Alexander McKenzie, administrator, of said state, was duly and legally appointed administrator of said estate of said Effie A. McKenzie, deceased; and that

thereafter, to wit, on the 10th day of March, 1911, said administrator duly and legally qualified according to law, and the letters of administration were on that date issued to him, giving him authority to handle and close up said estate.

4.

That at the time of commencing of the above said action, the said defendant, J. Albert Heath, was a resident of the city of Raymond, Pacific County, State of Washington. And that on February 1st, 1907, said defendant executed to plaintiff his certain promissory note in writing for the sum of Three Hundred ($300.00) Dollars, which certain note was due and payable six months after date.

5.

That after the execution of the above said promissory note the said defendant paid on said promissory note, to Effie A. McKenzie, the sum of One Hundred ($100.00) Dollars, and that there is now due and owing on said note the sum of Two Hundred ($200.00) Dollars, and interest on the same at six per cent per annum from February 1st, 1907; and that the said party was the owner of said note at the time of her death.

6.

That the said defendant, on or about May 1st, 1908, [69] entered into a written agreement with the plaintiff whereby the said defendant, for valuable considerations, did sell to the said Effie A. McKenzie an undivided one-half interest in forty shares of the capital stock of the Raymond Box Co. under the following conditions:

1st. Defendant reserved the right to vote all shares of stock at any of the meetings of the company.

2d. Said stock to be not transferable.

3d. Stock to be turned over in the regular way by certificate by the said defendant to the said Effie A. McKenzie as soon as the present certificates are released from bank, where the same are held as security for a loan to the Raymond Box Co.

7.

That since the making and entering into of the contract last above mentioned, and to wit: During the month of August, 1910, the said defendant absolutely converted said stock to his own use and sold and transferred and delivered the same to other parties, and collected the cash for the same.

8.

That the value of said shares of stock on the 1st day of May, 1908, and also on the date that the defendant converted the same to his own use, were reasonably worth the sum of Two Thousand ($2,000.00) Dollars. And that the said Effie A. McKenzie on the said date, May 1st, 1908, paid to the said defendant the sum of Two Thousand ($2,000.00) Dollars in cash, for said interest.

9.

That since the starting of the above said action the said defendant paid to the above-named plaintiff, said administrator of the estate of Effie A. McKenzie, deceased, the sum of Fifty ($50.00) Dollars on said contract, leaving a balance of One Thousand Nine Hundred Fifty ($1,950.00) Dollars. [70]

And that there is now due and owing from the de-

fendant to the said estate the sum of One Thousand Nine Hundred Fifty ($1,950.00) Dollars, and interest on the same at six per cent from the 1st day of May, 1908.

And as conclusions of law from the foregoing findings of fact, the Court concludes as follows:

That the plaintiff is entitled to a judgment against the defendant, J. Albert Heath, for the sum of Two Thousand One Hundred Fifty ($2,150.00) Dollars principal, and the sum of Four Hundred Ninety-four ($494.00) Dollars, interest on said amount up to the present day.

Done in open court this 17th day of February, A. D. 1912.

SOL. SMITH,
Judge of Said Court.

Filed April 18th, 1912. E. A. Seaborg, Clerk. By R. S. Van Tuyl, Deputy. [71]

In the Superior Court of the State of Washington in and for the County of Pacific.

ALEXANDER McKENZIE, Administrator of the Estate of EFFIE A. McKENZIE, Deceased,
Plaintiff,

vs.

J. ALBERT HEATH,
Defendant.

Judgment.

In this action the defendant above named having been regularly served with process and summons and complaint in the above-entitled action, personally on the 12th day of August, 1910; and that more than

twenty days having elapsed since said service, and that due proof of said service has been filed with the Clerk of said court in the above-entitled action. And the defendant not having appeared in said action, nor filed any answer nor demurrer to the complaint filed therein, and the default of said defendant, J. Albert Heath, and the premises, having been duly taken and entered according to law. And witnesses for the plaintiff having been duly sworn and testified, the cause submitted to the Court for consideration and decision, and after due deliberation thereon the Court files its findings and decision in writing, and orders that judgment be rendered herein in favor of plaintiff in accordance therewith.

WHEREFORE, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that the plaintiff do have and recover of and from the defendant a judgment for the sum of Two Thousand Six Hundred Forty-four ($2,644.00) Dollars and costs of this action to be taxed.

Done in open court this 17th day of February, 1912.

SOL. SMITH,
Judge of Said Court.

Filed April 18, 1912. E. A. Seaborg, Clerk. By R. S. Van Tuyl, Deputy. [72]

State of Washington,
County of Pacific,—ss.

I, E. A. Seaborg, Clerk of the Superior Court of the county and State aforesaid, hereby certify the foregoing to be a full, true and correct copy of the Findings of Fact and Conclusions of Law of the

Judgment in cause numbered 2809, entitled, Alexander McKenzie, Administrator of the Estate of Effie A. McKenzie, deceased, plaintiff, versus J. Albert Heath, defendant. That I have compared the same with the original and is correct transcript thereof as the same remains on file and of record in my office.

Witness my hand and the seal of said Superior Court this 18th day of April, 1912.

[Seal] E. A. SEABORG,
Clerk of Superior Court.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Aug. 27, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [73]

Motion [to Amend Petition].

Now comes The Pacific State Bank and moves the Court that it be allowed to amend its Petition herein, a copy of which amendment is attached hereto, marked Exhibit "A," the said amendment to begin at the end of line 28 of page 3 of the Petition.

This Motion is based upon the entire records and files of this cause and upon the Affidavit of H. W. B. Hewen, attached hereto.

H. W. B. HEWEN,
HAYDEN & LANGHORNE,
Attorneys for Pacific State Bank. [74]

United States District Court, Western District of Washington, Southern Division.

No. ——.

EXHIBIT "A."

In the Matter of RAYMOND BOX COMPANY, Bankrupt.

Amendment to Petition of the Pacific State Bank.

"That said mortgage and the note secured thereby were executed on behalf of the corporation of Raymond Box Company, bankrupt, by J. A. Heath and Miles H. Leach, its President and Secretary, respectively, the said Heath and the said Leach being all of the trustees of said corporation and being the owners of all of the capital stock of said corporation and being in sole control of said corporation, and said corporation accepted and retained the benefits of said transaction.

WHEREFORE, the Raymond Box Company and the trustee in bankruptcy and the creditors of the corporation, are estopped to deny the authority of said officers to execute said mortgage on behalf of said corporation."

H. W. B. HEWEN,
HAYDEN & LANGHORNE,
Attorneys for Pacific State Bank. [75]

United States District Court, Western District of Washington, Southern Division.

In the Matter of RAYMOND BOX COMPANY, Bankrupt.

VERIFICATION.

United States of America,
District of Washington,
Western Division,—ss.

Joseph G. Heim, being first duly sworn, deposes and says on oath *deposes and says:* That he has read the foregoing proposed amendment, knows the contents thereof and that the same are true. That I am president of said Pacific State Bank and make this verification in behalf of same.

JOSEPH G. HEIM.

Subscribed and sworn to before me this 5th day of August, 1912.

[Seal] H. W. B. HEWEN,
Notary Public in and for the State of Washington, Residing at South Bend Therein. [76]

United States District Court, Western District of Washington, Southern Division.

No. ——.

In the Matter of RAYMOND BOX COMPANY, Bankrupt.

Affidavit of H. W. B. Hewen.

United States of America,
District of Washington,
Western Division,—ss.

H. W. B. Hewen, being first duly sworn, deposes

and says on oath that he is one of the attorneys for the Pacific State Bank, a corporation, petitioner herein. That the amendment sought to be made to the petition by petitioner is not sought for the purpose of vexation or delay, but that the matter of the proposed amendment is, in the opinion of affiant, material, and could not with reasonable diligence have been introduced sooner into the petition.

That the question of the validity of the mortgage of the petitioner was submitted to the Honorable C. H. Hanford by oral stipulation to the above Court between counsel in open court, and that the record then before the Court on the petition for review of the order of the referee, granting leave to petitioner to foreclose its mortgage, should be considered to be before the Hon. C. H. Hanford for the purpose of determining the validity of said mortgage. That actual execution of said mortgage by bankrupt was not questioned either upon argument or in the pleadings, excepting upon the grounds of the alleged insufficiency of the acknowledgment and upon the alleged failure to record the mortgage as a chattel [77] mortgage, although it was admitted to have been filed as a chattel mortgage and recorded as a real estate mortgage. That until the opinion of the Honorable C. H. Hanford was promulgated, affiant and all of the attorneys for the petitioner, and as affiant believes, the attorneys for the trustee and for the creditors, did not consider that the authority of the president and secretary of said corporation to execute said instrument was in issue, but in view of the said opinion being promulgated, affiant and the

other attorneys for the petitioner believe it only prudent to amend the petition so as to allege an estoppel and to conform to the proof actually and without objection admitted.

Further affiant saith not.

H. W. B. HEWEN.

Subscribed and sworn to before me this 5th day of August, 1912.

[Seal] P. W. RHODE,

Notary Public in and for the State of Washington, Residing at South Bend Therein.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Aug. 7, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [78]

[Order Granting Pacific State Bank Leave to Amend Petition, and Denying Offer of Attorney for Trustee.]

The motion of Pacific State Bank for leave to amend its petition herein by adding certain words, beginning at the end of line 28, on page 3 of the petition, coming on this day to be heard, the said bank appearing by H. W. B. Hewen and Messrs. Hayden & Langhorne, its attorneys; the trustee appearing by Charles E. Miller, his attorney, and certain creditors claiming the right to appear by Messrs. Welsh & Welsh; it appearing to the Court that due notice of said application has been given and that said motion for leave to amend is in effect only to conform with the proof introduced without objection, and although the trustee offered upon said motion the following exhibit, marked "Exhibit No. 1," to wit:

[EXHIBIT NO. 1.]

Affidavit of Charles E. Miller in Opposition to Motion to Amend Petition.

State of Washington,
County of Pierce,—ss.

Charles E. Miller of Pacific County, being duly sworn according to law deposes and says as follows:

1. That he is now and has been for thirty-eight years last past a licensed attorney at law, following his profession as such for his entire ten years of residence at South Bend in said County of Pacific.

2. That for eight years last past, he has been acquainted with J. A. Heath, the President of said bankrupt Raymond Box Company; that he has known Effie A. Scott during her lifetime, was well acquainted with her for thirty years; that said Effie A. Scott was on May 1st, 1908, a resident of Raymond, said County of Pacific, and was employed as housekeeper by the said J. A. Heath at the boarding house of said Bankrupt plant.

That on or about May 1st, 1908, the said J. A. Heath sold an equal and undivided half interest of forty shares of the capital stock of the said Bankrupt Company, which transaction was evidenced by said parties [79] by the written instrument, a copy of which is herewith attached and marked Exhibit "A"; and that as attorney of Effie A. Scott, deponent made demand on said J. A. Heath of said stock, the said Heath, then and there admitted to this deponent that he had entered said contract with Effie A. Scott, that she was owner of the shares

therein described, that all of said shares had been deposited in the Pacific States Bank as collateral security for a loan and that as soon as a release could be secured he would deliver said stock.

That after repeated demands on said Heath and failure on his part to deliver said stock, this deponent began action on transaction that he has failed herein to recover the said stock, due personal services being had on the said J. A. Heath.

That Effie A. Scott died September, 1910, that Alex MacKenzie, the then husband of the said Effie A. Scott, was appointed administrator of her estate and that said shares of stock was taken inventory as part of the said estate.

That thereafter to wit: on December 2nd, 1910, the mortgage in question herein was made and whereupon the said Heath obtained possession of said stock, converted same to his use and later the said judgment was rendered.

That on May 8th, 1911, the said Heath wrote the administrator that as he only realized ten per cent. on said stock, that the actual amount had on said Effie A. Scott one-half interest was not large and that he enclosed the sum of Fifty Dollars on account of same. That this deponent has said original letter which he knows to be in the handwriting and to be the letter and act of said J. A. Heath, and he tenders same for the inspection of the Court and Council to be filed if the Court shall direct.

That said J. A. Heath acknowledged to this deponent repeatedly that said Effie A. Scott was the

owner of said stock and therefore was not questioned.

CHARLES E. MILLER.

Subscribed and sworn to before me this day, August 12, 1912.

R. W. JAMIESON,
Deputy Clerk. [80]

EXHIBIT "A."

This agreement made this first day of May, 1908, between J. A. Heath, party of the first part, and Effie A. Scott, party of the second part, witnesseth:

The party of the first part for the sum of one dollar and other valuable consideration sells to party of the second part and undivided half interest in forty shares of the capital stock of the Raymond Box Company under the following conditions:

First: Party of first part reserves the right to vote all shares of stock at any of the meetings of the Company.

Second: The said stock to be not transferable.

Third: The stock to be turned over in the regular way *be* certificate by party of first part, to parties of first and second parts as soon as the present certificates are released from bank where same are held as security for a loan to the Raymond Box Company.

(Signed) J. A. HEATH,
EFFIE A. SCOTT.

And the letter of J. A. Heath, dated May 8, 1911, marked "Exhibit No. 2," to wit:

[EXHIBIT NO. 2.]

[Letter Dated May 8, 1911, from J. A. Heath to "Dear Friend Alex."]

"Vancouver, May 8th, 1911.

Dear Friend Alex:

I received your letter in due time but have been very slow answering. I am glad to know that you have got through with the main part of the trouble in getting the affairs of the estate settled. I got a few lines from Stanley and he was saying he had been paying a visit to his Aunt Ida and he was telling me how many little chickens she had. I am just leaving *her* for Seattle where I will be staying for a few days and I am then going to Portland for a week and from there to San Francisco where I expect to remain till about the 10th of June and will then return to Vancouver. You will understand Alex that in selling out the Raymond business we had lost so much money during the depression that we only realized 10% on the stock, so the amount actually due on Effie's half interest was not very large but all the same Alex I shall continue making payments beyond the time same is settled and have decided to commence by sending the sum of Fifty Dollars on account of same and will continue paying said sum every six months with interest from this date, [81] and will enclose a draft in this letter for this amount. I want also to express my *apreciation* to you of how good you have been in this matter. I used to tell Effie many a time that I felt like taking off my hat to you for your goodness and untiring patience in every matter where she was concerned, and I assure you I feel the same now. You may tell Stanley

while I am in San Francisco I shall look up if possible a better printing press for him for I know he feels very much interested in the printing business and I think if he had a better one he would make quite a little money on the side from that source, beside being a pleasure to him. I wish you would write me to Portland and tell me all the news—what the Box Factory are doing at this time and what they intend turning the place into. I feel interested in knowing if same will be made into a veneer plant. Give my respects to all the folks—Stanley and yourself.

Yours truly,

J. A. HEATH.

You can address General Delivery—Portland or San Francisco."

The Court declined to permit the same to be filed, read in evidence or to be considered, whereupon it was

ORDERED that leave to amend be and it is granted to the Pacific State Bank; that the proposed amendment to the petition filed herein on the —— day of August, 1912, stand as the amendment to said petition, and the offer of the attorney for the trustee to introduce his affidavit, dated August 12, 1912, and the letter of J. A. Heath to the administrator of the estate of Effie MacKenzie, not being germane to the motion before the Court, it is denied, to all of which the attorney for the trustee excepts and his exception is allowed.

Dated this 12th day of August, 1912.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Aug. 13, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy. [82]

[Order of Referee Granting Petition of Pacific State Bank for Leave to Foreclose Mortgage in Proper Court Having Jurisdiction Thereof, and to Make Trustee a Party, etc.]

Order of Referee Denying Leave to Foreclose Mortgage.

This matter having come on for hearing on the order to show cause why the petition of the Pacific State Bank for leave to foreclose its mortgage claimed by it on the real and personal property of the bankrupt, which said mortgage is specifically set out in said petition should not be granted, the petitioner appearing by H. W. B. Hewen and Hayden & Langhorne, its attorneys, the trustee appearing by Charles E. Miller, his attorney, and numerous creditors appearing by Welsh & Welsh, their attorneys, the Court having permitted said creditors to intervene and file their answer to said petition herein. The Referee in Bankruptcy being duly advised in the premises, and it appearing to the Referee that the return of the trustee and the answer of said creditors makes certain allegations intended to question the validity of the said mortgage upon grounds specifically set out in said return and said answer, and the Court being of the opinion that such questions ought not to be determined by this Court at this time, and in a summary proceeding, and in this proceeding, but if questions as to the validity of said mort-

gage exist, such questions are proper as a matter of defense in any proceeding which may be begun for the foreclosure of said mortgage, and the Referee therefore grants the petition of the Pacific State Bank for leave to foreclose said mortgage in the proper court having jurisdiction thereof, and to make the trustee in bankruptcy herein a party, and directs the trustee in bankruptcy to enter his appearance in the way of defense, or by [82a] intervention as he may be advised is proper, in any such proceeding, to which order and ruling of the Court, the trustee, by his attorney, Charles E. Miller, and the creditors who filed their return herein by their attorneys, Welsh & Welsh, duly *excepts, asks* for a certificate from the referee to the Judge for the reason that they contend that the Referee should at this time determine whether or not said mortgage was a valid mortgage, and if he should determine it was not a valid mortgage, that he should then refuse to grant permission to the Pacific State Bank to foreclose said mortgage.

Done in open court this 19th day of April, 1912.

WARREN A. WORDEN,
Referee in Bankruptcy.

[Endorsed]: "Filed on this 19th day of April, 1912. Warren A. Worden, Referee in Bankruptcy." [82b]

Stipulation of Facts.

It is agreed between the parties hereto for the purposes of appeal as follows, to wit:

That the bankrupt is justly and truly indebted to

the Pacific State Bank in the sum evidenced by the note hereinafter described; that the consideration of said debt is money loaned by said bank to the bankrupt; that there was on March 18, 1912, due on the note evidencing such indebtedness the sum of $22,351.71, with interest from October 1, 1911, at eight per cent per annum, no part of which has been paid, and the same was and is long past due and owing; that the original note was duly filed with the claim of the said bank and withdrawn by the order of Court, and that the copy thereof now attached to the claim is a true and literal copy of the original note; that the copy of the instrument claimed by the Pacific State Bank to constitute a mortgage, certified by the auditor of Pacific County under date of March 23, 1912, and filed in this court July 26, 1912 (after the petition for review of the order of the Referee in Bankruptcy had been served and filed), is a true and literal copy of the original instrument of which it purports to be a copy; that at the time of the execution and delivery of said instrument, to wit, December 2, 1910, J. A. Heath, who executed the same as president of the corporation, and Miles H. Leach, who executed the same as secretary thereof, were respectively president and secretary of said corporation; that the evidence as to whether the said president and secretary were the sole trustees of said corporation and were the owners of all the capital stock thereof consists of the affidavit of Miles H. Leach, and the findings and judgment of the Superior Court of the county of Pacific in the case of Alex McKenzie, administrator, vs. J. Albert Heath; that

the corporate seal attached to said instrument was and is the [83] authorized corporate seal of the bankrupt and was affixed to said instrument by the secretary, as secretary thereof; that the said instrument was filed for record in the office of the auditor of Pacific County, Washington, in which the property described in said mortgage is situated, on the 8th day of December, 1910, at 1:15 o'clock P. M. and recorded in Book 30 of mortgage records, at page 31, and was also filed on the same date as a chattel mortgage in the same office but not recorded as such.

IT IS FURTHER AGREED that the Pacific State Bank, petitioner and claimant, and the Raymond Box Company, bankrupt, are corporations organized under the laws of Washington.

IT IS FURTHER AGREED that the value of the real and personal property described in said instrument claimed to be a mortgage is approximately and does not exceed Twenty Thousand ($20,000) Dollars.

IT IS FURTHER AGREED that subsequent to the stipulation heretofore filed and dated April 24, 1912, the petitioner, the Pacific State Bank, has duly filed its claim for the indebtedness due it as a preferred claim, based upon said instrument claimed by it to constitute a mortgage.

IT IS FURTHER AGREED that the bankrupt is indebted in the sum of about Fourteen Thousand ($14,000) Dollars, to creditors other than the Pacific State Bank, and that all of said creditors became such subsequent to the execution of said instrument claimed to constitute a mortgage, and prior to the adjudication in bankruptcy, and the following cred-

itors had no actual knowledge of the fact of said alleged mortgage prior to the time the bankrupt became indebted to them, to wit: Raymond Foundry & Machinery Company, Siler Mill Company, Willaha Lumber Co., W. W. D. Wood Company, Pearce Brothers and T. H. Bell. [84]

IT IS FURTHER STIPULATED that at all times prior to the filing of the petition by the Pacific State Bank for leave to foreclose, and at all times since and now the Trustee was and is in the full, actual and manual possession of all of the property of the bankrupt described in the mortgage.

IT IS FURTHER STIPULATED that there shall be incorporated as part of the record and transcript on appeal in addition to this stipulation following papers, to wit: 1st, the petition of the Pacific State Bank for the leave to foreclose, the return of the trustee, the return of certain unsecured creditors and the replications of the bank; 2d, the affidavit of M. H. or Miles H. Leach as to who were stockholders, etc.; 3d, findings and judgment of the Superior Court of the Pacific Company in the case of McKenzie vs. Heath; 4th, the motion of the petitioner of the Pacific State Bank for leave to amend and order permitting amendment; 5th, the stipulation dated July 25th, 1912; 6th, the copy of the mortgage and note of the instrument claimed by the Pacific State Bank to be a mortgage and the note of the Pacific State Bank filed July 26th, 1912; 7th, the proof of claim of the Pacific State Bank; 8th, this stipulation; 9th, the order or judgment of the Court; 10th, the proceedings for the taking of the appeal and the perfec-

tion thereof. It is also agreed that both parties have taken exceptions for all rulings hostile to them.

IT IS AGREED that the record so made up will be sufficient for review and will contain that [85] portion of the record necessary to the hearing in the Circuit Court of Appeals, but this stipulation shall not conclude either of the parties if, in the opinion of such parties it is necessary to cause to be certified as a part of the transcript or subsequent thereto any other portion of the evidence or the record.

Dated this 24th day of August, 1912.

CHAS. E. MILLER,
Attorney for Trustee.
H. W. B. HEWEN,
HAYDEN & LANGHORNE,
Attorneys for Pacific State Bank.
WELSH & WELSH,
Attorneys for Unsecured Creditors.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Aug. 27, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [86]

Order [Making Certain Additional Papers a Part of the Record, etc.].

On the application of the Pacific State Bank for an order making a part of the record various papers, affidavits and other instruments introduced in evidence before the Referee in Bankruptcy and by him transmitted for consideration in connection with the petition for review of the order of the referee in the matter of the petition of the Pacific State Bank for

leave to foreclose its mortgage, said papers, affidavits and other instruments having been heretofore considered by the Court in a determination of the validity of the mortgage claimed by the Pacific State Bank,

IT IS ORDERED that the following papers, in addition to the papers already a part of the record herein, shall be and are hereby made a part of the record in this cause, to wit: The petition of the Pacific State Bank for leave to foreclose its mortgage, the return of the trustee thereto, the answer of certain unsecured creditors thereto, the replication of the Pacific State Bank, the affidavits of the following: F. C. Lewis, and C. W. Reed, I. W. Homan, Ernest F. Rhodes, J. W. Kleeb, Joseph G. Heim, H. W. B. Hewen, Miles H. Leach, dated April 16, 1912, E. E. Case and F. R. Brown, M. E. Riley, Neal Stupp. Also a certified copy of the findings and judgment of the Superior Court of the State of Washington for Pacific County in the cause of Alex McKenzie, administrator of the estate of F. A McKenzie, deceased, against J. Albert Heath.

Also the stipulation between the attorney for the trustee and the attorneys for the Pacific State Bank, dated July 22, 1912. Also the stipulation between said parties and Welch & Welch, attorneys for unsecured creditors, dated April 24, [87] 1912, and the stipulation between the same parties dated August 24, 1912. Also the copy of the instrument claimed by the Pacific State Bank to constitute a mortgage certified by the Auditor of the Pacific County and filed herein on the 26th day of July, 1912. Also the

proof of claim of the Pacific State Bank filed in the office of the clerk, July 26, 1912. Also the affidavits attached to the return of the trustees, to wit: Exhibit "A." "B," "C," "D," "E," "F," "G," and "H." Any of said instruments not already marked "filed" are directed to be filed by the clerk and so marked.

Dated this 27th day of August, 1912.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Aug. 27, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy." [88]

Memorandum Decision In Re Mortgage Owned by the Pacific State Bank.

By reference to the papers on file I find that on the 5th day of April, 1912, the referee having charge of the proceedings in this case made an order based upon a petition presented to him by the Pacific State Bank, a corporation of the State of Washington directing the trustee of the bankrupt's estate to show cause on a specified date why said corporation (hereinafter for convenience designated as "The Bank") should not be granted leave to foreclose a mortgage covering real and personal property constituting the manufacturing plant of the bankrupt corporation, alleging the same to be the first mortgage and a prior lien upon all of said property and to join the trustee as a party defendant in such foreclosure suit, in any court having jurisdiction. Responding to said show cause order, the trustee, on the 19th day of April, 1912, made a return in writing opposing the petition

and containing allegations contesting the validity of the mortgage. A large number of creditors of the bankrupt also filed an answer to said petition in opposition to the granting of leave to foreclose said mortgage, traversing the material allegations of the petition and pleading affirmatively their rights as creditors and matters of fact and law constituting grounds for holding the mortgage to be void in law and equity. The Bank filed replications to the return of the trustee and to the answer of the creditors. The controversy as set forth in the pleadings above enumerated was heard by the referee on the 19th day of April, 1912, and thereupon he made an order granting The Bank leave to foreclose said mortgage in the proper court having jurisdiction thereof and to make the trustee a party, and by virtue of that order The Bank **[89]** claimed the right to institute a foreclosure suit in the Superior Court for the State of Washington. Exceptions were taken to the order granting leave and upon a petition for review of the referee's decision he certified the case to the court. On May 16th, 1912, by a stipulation signed by attorneys representing the trustee, unsecured creditors and The Bank, the following facts were admitted:

> "That the petitioner, Pacific State Bank, has not, at any time, filed its claim or any claim for the indebtedness represented by the note and mortgage described in its said petition.
>
> That at the time the said petitioner, Pacific State Bank filed its said petition for leave to foreclose its said mortgage and at the time the

order to show cause thereon was issued the trustee in the above-entitled matter was in the full, actual and manual possession of all of the property of the bankrupt described in said mortgage.

That at the time the said petition was verified, to wit, on March 18, 1912, there was due on the said note the sum of $22,351.71, with interest thereon from October 1, 1911, at eight per cent per annum, no part of which had been paid, and that the same was long past due and owing; and that the copies of said note and mortgage filed by the petitioner are true copies of the original thereof."

In the administration of insolvent estates through judicial proceedings, for the sake of economy and expedition, it is desirable that a single court should marshal the assets, adjudicate conflicting claims and determine the priorities between competing creditors, lien claimants and all parties asserting rights with respect to the *res* and distribute the funds to the parties according to their rights in order that the administration may be complete and final. Therefore, it is obvious that the proper court to adjudicate all such matters and controversies must be the court which first acquires legal custody of the *res* and jurisdiction of the subject matter involved. 1 Loveland on Bankruptcy (4th ed.), p. 107, sec. 31; 2 Loveland on Bankruptcy (4th ed.), p. 1039–1040; Murphy v. Hofman Co., 211 U. S. 562, 53 L. Ed. 327. By [90] the stipulation above mentioned it appears that this Court, through the trustee in bankruptcy,

did have legal custody of the mortgaged property when The Bank presented its petition to the referee asking leave to foreclose said mortgage, and by the law this Court is vested with full jurisdiction to adjudicate all questions as to the validity of said mortgage and as to preferential claims and to sell the property and apply the proceeds to the payment of the mortgage debt, if it shall be adjudged to be a valid lien upon all or any part of the property, and in that manner to protect the rights of The Bank as effectually as might be done by an ordinary foreclosure proceeding in another court. And to avoid vexatious complications with respect to expenses incidental to the custody and preservation of the mortgaged property, it is for the advantage of all parties to have the estate fully administered in the bankruptcy proceedings. For these reasons I have heretofore made an oral announcement of the determination of the Court to set aside the order made by the referee granting leave to foreclose the mortgage in any other court and at the same time I directed attention of counsel to the fact that The Bank had failed to file its claim as a preferred creditor based upon the mortgage, and requested them to consider the question whether without such claim being filed and without other pleadings the controversy could be properly adjudicated. In response to my suggestion The Bank through its attorneys has filed in this court a verified proof of its claim as a secured creditor, accompanied by a certified copy of the record of the mortgage and a copy of the promissory note secured thereby after exhibiting to the Court the original

note, and by a stipulation signed by the attorney for the trustee and attorney for The Bank the case has been submitted to me for decision of the questions affecting the validity of the mortgage. **[91]**

The validity of the mortgage is assailed on two grounds, viz.: 1. There is no record evidence of authority conferred by the board of trustees of the mortgagor to encumber this property by a mortgage; 2. The mortgage is void upon its face because the certificate of acknowledgment lacks the essentials of validity prescribed by a statute of this state, to wit: an act entitled: "An Act providing the form and contents of acknowledgments of corporations to instruments executed and acknowledged by corporations." Laws of Wash. 1903, 245.

The mortgagor is a Washington corporation and its powers must be exercised conformably to the laws of this State, and to sustain his contention the trustee of the bankrupt estate relies upon a statute of the State prescribing that: "The powers of corporations must be exercised by a board of not less than two trustees who must be stockholders of the company." Rem. & Ball. Codes of Wash., sec. 3686; Pierce's Code, 1905, sec. 7059, and the statute above cited prescribing the essentials of a valid certificate of acknowledgment by which the execution of a deed or mortgage by a corporation must be authenticated, the statutory requisites being as follows: The officer to whom the acknowledgment is made must certify (a) that the person assuming to execute an instrument as the act and deed of corporation requiring an acknowledgment, must certify that such person is

known to him to be the president, vice-president, secretary, treasurer, or other authorized officer or agent, as the case may be, of the corporation that executed such instrument; (b) that such officer or agent acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned; (c) and on oath stated that he was authorized to execute said instrument; (d) and that the seal affixed is the *corporate* [92] *board* of trustees as an organized body, the execution of the mortgage was authorized. The mere assent of the members of the board separate and apart is not equivalent to action by the board or the corporation as an entity, and without evidence of such action the Court is not authorized to presume that the corporation did in fact encumber its working plant and all of its substantial assets.

7 Am. & Eng. Enc. of Law (2d ed.), 701;

3 Washburn on Real Property (4th ed.), 262.

The certificate of acknowledgment is of the following tenor:

"State of Washington,

County of Pacific,—ss.

Be it remembered that on this 2nd day of December, 1910, before me, the undersigned, a notary public in and for the State of Washington, personally appeared the within named J. A. Heath and Miles H. Leach, each to me well known to be the identical persons above named and whose names are subscribed to the within and foregoing instrument, the said J. A. Heath, as President and the said Miles H. Leach, as

Secretary of said corporation, and the said J. A. Heath acknowledged to me then and there that he as president of said corporation had affixed said name together with his own name, freely and voluntarily as his free act and deed and the free act and deed of said corporation; and the said Miles H. Leach also then and there acknowledged to me that he as secretary of said corporation had signed the above instrument as secretary of said corporation by his free and voluntary act and deed and the free and voluntary act and deed of the said corporation. Witness my hand and official seal.

[Notarial Seal] H. W. B. HEWEN,
Notary Public Residing at South Bend, Washington."

This does not meet the requirements of the statute. It is sufficient because it does not certify that the official character of the persons who made the acknowledgment as officers of the corporation was known to the certifying officers, and because it lacks the required declaration *on oath* of said officers *that they were authorized to execute the instrument,* and because it lacks the declaration *on oath* of said officers *that the seal affixed was the seal of the corporation.* These defects are glaring and the Court cannot give effect to the mortgage as a valid **[93]** seal of said corporation.

The statute of this State governing conveyances of real property specifically provides that all conveyances of real estate or any interest therein and all contracts creating or evidencing any encumbrance

upon real estate shall be by deed. A deed shall be in writing, signed by the party bound thereby and acknowledged by the party making it before some person authorized by the laws of this state to take the acknowledgment of deeds. Rem. & Ball. Code of Wash., sec. 8745–6; Pierce's Code (1905), sec. 4435–6. The special act heretofore cited prescribes the particular form of acknowledgment applicable to instruments executed by corporations.

Instruments not acknowledged as required by these statutes are void. Forester vs. Reliable Transfer Co., 59 Wash. 86.

The mortgage which is the subject of this controversy is dated December 2, 1910, and its validity or invalidity must be adjudged conformably to these statutes enacted in the exercise of legislative power to regulate the conduct of corporations within the State and the mode of conveying titles to property and their observance is necessary in order to maintain confidence in the stability of recorded titles.

The introductory and concluding clauses of the instrument are as follows:

> "THIS INDENTURE made this 2nd day of December, 1910, between the Raymond Box Company, a corporation, organized and existing under the laws of the State of Washington, party of the first part and Pacific State Bank, also a corporation organized and existing under the laws of the State of Washington, party of the second part: * * *
>
> In witness whereof, the said party of the first part has hereunto affixed its corporate seal and

these presents to be effected by its President and Secretary with the authority of the Board of Trustees."

And this is all that appears by the instrument itself or in the case to warrant an inference that by any act of the [94] lien upon the bankrupt estate contrary to the plainly expressed will of the legislature. To do so would be a judicial nullification of a statute, the validity of which has not been questioned. Furthermore a decision giving effect to an instrument creating a lien upon property in this state lacking in formalities prescribed by the statutes of the State, would be in opposition to decisions of the Circuit Court of Appeals for the Ninth Circuit upholding the principle that statutes prescribing the mode of executing instruments required to be recorded as evidence of rights to property in this state, are mandatory and that such instruments lacking the prescribed solemnities are void.

Chilberg vs. Smith, 174 Fed. Rep. 805;
Mills vs. Smith, 177 Fed. Rep. 652;
In re Osborn, 196 Fed. Rep. 257.

It is useless to try to sustain this mortgage by disputing the right of the trustee to contest it. Lacking as it does a sufficient certificate of acknowledgment it is impotent to create a lien, and the trustee holds the title unencumbered by virtue of the bankruptcy law. In re Osborn, 196 Fed. Rep. 257.

Authorities have been cited sustaining the right of a mortgagee in possession of mortgaged property and holding as security for a valid debt against claims of other creditors having no lien and that such

nonlien creditors have no standing to contest the mortgagee's rights, merely because the mortgage was defective or void. In such a case the right to the security is equivalent to the right of a pledgee because based upon actual possession, but in this case the trustee, not The Bank, is in possession.

I find among the papers an affidavit by Mr. Leach, secretary of the bankrupt corporation, affirming the facts omitted in the certificate of acknowledgment of the mortgage and also [95] stating that at the time of the execution of the mortgage, all of the stock of the corporation was owned by himself and the president of the corporation, who joined in execution of the mortgage, and that himself and the president were the only trustees of the corporation at that time. I deem it sufficient to say in regard to this affidavit that it cannot be regarded as a plea of estoppel nor as competent evidence, either to sustain such a plea or to cure the defective certificate of acknowledgment.

For the reasons stated it is my opinion that this mortgage is a void instrument and that the claim of The Bank should be allowed only as an unsecured claim, and the mortgage security rejected.

C. H. HANFORD,
Judge. [96]

[Addenda to Memorandum Decision Re Mortgage.]

It has been made known to me that counsel for The Bank are aggrieved by the brief and somewhat abrupt treatment which the affidavit of Mr. Leach received in the foregoing memorandum, and it is necessary to make a more extended explanation of

my opinion in this case in order to avoid a misunderstanding which might be the basis for unfairly criticising their conduct of the case. The manner in which the case has been prepared and argued convinces me that the work of counsel has been faithfully and intelligently performed, and that nothing has been left undone which might lead me to a different conclusion or decision of the case.

I wish to say further that in my study of the case I did not fail to notice the important facts that the claim of The Bank is for a *bona fide* debt due and owing to it by the bankrupt corporation; that credit was given by The Bank to the corporation in reliance upon the instrument purporting to be a mortgage which the parties thereto believed had been executed with due formality and constituted a valid lien; that it is conceded by all the litigants in this case that said instrument was in fact signed, sealed with the corporate seal, acknowledged, certified, delivered and recorded at the times and in the manner indicated by the instrument itself and the endorsements thereon; and that the testificandum clause recites that its execution by its president and secretary was authorized by the board of trustees. With these matters in mind the Court must decide the question whether the document itself, aided by a conclusive presumption that it speaks the truth and tested by the rules of law applicable thereto, proves its own validity. I adhere to the opinion intended to be expressed in the memorandum originally filed, that it is invalid and impotent to create a lien. The defects apparent upon an inspection [97] of the document are lack

of authority conferred *by a corporate act* to execute a mortgage and lack of the statutory requirements in the certificate of acknowledgment. These defects are not supplied and cannot be supplied by any pleading or proof, or pleading and proof of the matters stated in Mr. Leach's affidavit. The Court cannot find, by reading the document nor by evidence offered or suggested, that at any time there was a lawfully convened meeting of the board of trustees at which action was taken by the board as an organized body conferring authority to execute a mortgage. I do not mean to affirm that the minutes of a meeting of the board of trustees would be the only competent evidence to prove that such a meeting was held or of the action taken, but to meet the objection urged against the validity of this mortgage on the ground of lack of authority to execute the same, as the document itself does not recite specifically the time and manner of granting authority, some evidence is necessary to prove affirmatively that the authority was conferred by act of the board of trustees as an organized body. The certificate of acknowledgment is insufficient and the defects are not formal but substantial as I have before stated, and this objection to the validity of the instrument cannot be overcome by any evidence because the certificate itself is a substantial part of the mortgage. The making of a certificate is an official act and the facts required to be certified must be certified in accordance with the requirements of law. In this case the certificate is lacking and no substitute for it will meet the exactions of the law. If in place of Mr. Leach's

affidavit the facts stated therein had been formally pleaded as an estoppel, in bar of any attempt to contest the validity of the mortgage, and if the plea had been supported by testimony taken according to the usual course of procedure in introducing [98] evidence in a suit in equity, and if such evidence were uncontradicted or even confirmed by admissions of the adverse party, the relative rights of the parties to this controversy would not, in my opinion, be at all changed.

The issue to be decided is whether the instrument called a mortgage has any virtue as a legal contract creating a valid lien upon the bankrupt's property. Now to elaborate in detail the grounds of my decision so that, if possible, it shall not be misunderstood by anyone, I will say, in addition to what has been said, that there is a right way for corporations to exercise their powers in dealing with property, and no other way is right. When natural persons avail themselves of the supposed advantages of transacting business through the medium of an artificially created person, called a corporation, they should keep in mind the important fact that their rights as individuals with respect to the business conducted by, or the property vested in, the corporation are not merely merged in the artificial person. It must act through its own agents and according to its organic law. If Mr. Heath and Mr. Leach owned the plant of the Raymond Box Company, and conveyed the title and possession of it to a third person named John Smith, it would not be supposed that they could afterwards create a valid lien upon the same prop-

erty by executing a mortgage, and it is the sense of my decision that Mr. Heath and Mr. Leach could not, by their act in executing a mortgage, create a valid lien upon the plant when the title was fully vested in the bankrupt corporation. The right way for a corporation to execute its power to mortgage its property is to have a formal meeting of its board of trustees at such a time and place, and pursuant to such a notice, as will enable all of the members to be present, and at such meeting all or a quorum must be present and act as a body and not [99] as individuals in the adoption of a resolution authorizing the execution of the proposed mortgage, and then the instrument should be written, signed, sealed and acknowledged by officers or agents of the corporation authorized by it to act, and then the instrument should have appended to it the certificate of acknowledgment and sworn statement which the law specifically requires. The formal meeting of the board of trustees should be evidenced by a record kept of the proceedings of the board of trustees and an instrument affecting the title to property should contain a specific reference to the action of the board of trustees conferring authority for its execution. It is for lack of authority to execute the mortgage so conferred and of a certificate of acknowledgment and sworn statement conforming to the requirements of a statute of this State that I hold the mortgage in question to be void, and when I use the word "void" I mean that it has not virtue to affect the legal title of the corporation as a distinct entity. By force and virtue of Section 70 of the Bankruptcy Law, and

Section 47 as amended, the unencumbered legal title of the bankrupt corporation to the property in controversy passed to and became vested in the trustee and that legal title has been reinforced by his actual manual possession of it, therefore, the trustee is not in the situation of a nonlien creditor endeavoring to pick flaws in a mortgage for the purpose of uncovering property subject to execution. With respect to the property he represents the legal owner and all of the unsecured creditors. In that situation the mere equitable rights of The Bank which might be asserted against the bankrupt corporation alone or its stockholders, cannot prevail in this court. On this proposition the decisions of the Circuit Court of Appeals for the Ninth Circuit which has been cited are [100] controlling and conclusive.

C. H. HANFORD,
Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jul. 31, 1912. E. W. Engle, Clerk. R. W. Jamieson, Deputy." [101]

[Decree.]

This cause came on to be heard at this term upon the exceptions made by the Trustee to the order of the referee in bankruptcy and the petition for review of the order of the referee in bankruptcy allowing foreclosure of the mortgage of the Pacific State Bank in the State court, and upon the subsequent stipulation of the parties that the Court should determine the validity of said mortgage, and upon the proofs made and the agreed statement of facts filed in this court

on the 27th day of August, 1912; the trustee appearing by Charles E. Miller, his attorney; The Pacific State Bank appearing by H. W. B. Hewen and Hayden & Langhorne, its attorneys; the Court having examined the evidence adduced before the referee in bankruptcy, and having also examined the agreed statement of facts, and being now duly advised in the premises, it is

ORDERED, ADJUDGED and DECREED that leave to foreclose said mortgage in the State court be and it is denied, to which ruling attorneys for the Bank except and their exception is allowed.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that said mortgage be and it is adjudged to be invalid and of no effect for want of a proper acknowledgment, and for lack of authority in the president and secretary to execute the same, to which judgment the attorneys for the Bank except and their exception is allowed.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the claim of the Pacific State Bank be allowed as a general claim, and its claim for preference based upon its alleged [102] mortgage be and it is rejected, and so far as said claim for a preference is rejected by this order, the attorneys for the Bank except and their exception is allowed.

Dated this 20th day of September, 1912.

EDWARD E. CUSHMAN,
Judge.

O. K.—CHAS. E. MILLER,
Attorney for Trustee.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Sep. 20, 1912. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." **[103]**

Assignment of Errors.

Comes now the Pacific State Bank, petitioner herein, and files the following assignment of errors upon which it will rely upon the prosecution of its appeal from the order and decree made by this honorable Court on the 20th day of September, 1912, to wit:

1. The Court erred in adjudging that the mortgage of the petitioner, the Pacific State Bank, is invalid and of no effect.

2. The Court erred in adjudging that the mortgage of the petitioner, the Pacific State Bank, was invalid for want of a proper acknowledgment, and erred in holding and adjudging that the said mortgage was not properly acknowledged.

3. The Court erred in adjudging that the mortgage of the petitioner, the Pacific State Bank, was invalid and of no effect for lack of authority in the President and Secretary to execute the same, and in holding and adjudging that the President and Secretary of the Raymond Box Company did not have authority to execute said mortgage.

4. The Court erred in adjudging that the claim of the Pacific State Bank for preference, based upon its mortgage, be rejected.

5. The Court erred in entering its order of September 20, 1912, in favor of the trustee in bankruptcy and against the petitioner.

In order that the foregoing assignment of errors may be and appear of record, the petitioner, the Pacific State Bank presents the same to the Court and prays that such disposition may be made thereof, as is in accordance with **[104]** the laws and statutes of the United States in such cases made and provided, all of which is respectfully submitted.

H. W. B. HEWEN,
HAYDEN & LANGHORNE,
Attorneys for the Pacific State Bank, Petitioner.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Sep. 20, 1912. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." **[105]**

In the District Court of the United States, for the Western District of Washington, Southern Division.

No. 1054.

In the Matter of the RAYMOND BOX COMPANY, Bankrupt.

Petition for Appeal.

To the Honorable E. E. CUSHMAN, Judge of the Above-named Court, Presiding Therein:

The Pacific State Bank, petitioner herein, conceiving itself aggrieved by the order and decree made and entered by the above-named court in the above-entitled court, under date of September 20th, 1912, wherein and whereby, among other things, it was and is ordered and directed that the petition of the Pacific State Bank for leave to foreclose its mortgage in the State court be denied, and wherein the mort-

gage of the Pacific State Bank is adjudged to be invalid, and of no effect for want of proper acknowledgment, and for lack of authority in the president and secretary to execute the same, and wherein the claim of the Pacific State Bank for a preference, based upon its mortgage, be and is rejected, does hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from said order and decree, and particularly from that part thereof which adjudges the Pacific State Bank's mortgage to be invalid and of no effect, and which adjudges the said mortgage invalid for want of a proper acknowledgment and for lack of authority in the president and secretary to execute the same, and also [106] from that portion of said order and decree which rejects the claim of the Pacific State Bank, based upon its mortgage, for a preference for the reasons set forth in the assignments of error which is filed herewith, and it prays that its petition for said appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order is made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 20th day of September, 1912.

H. W. B. HEWEN,
HAYDEN & LANGHORNE,
Attorneys for the Pacific State Bank.

Order [Granting Petition on Appeal].

The foregoing petition on appeal is granted, and the claim of appeal therein made is allowed.

IT IS FURTHER ORDERED that the bond on appeal be fixed at the sum of Five Hundred no/100 ($500.00) Dollars.

Dated this 20th day of September, 1912.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Sep. 20, 1912. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." **[107]**

In the District Court of the United States, for the Western District of Washington, Southern Division.

No. 1054.

In the Matter of the RAYMOND BOX COMPANY, Bankrupt.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, The Pacific State Bank, a corporation organized under the laws of Washington, with its principal place of business at South Bend, Pacific County, Washington, as principal, and American Bonding Company of Baltimore, Md., as surety, are held and firmly bound unto A. S. Coats, trustee in bankruptcy of the Raymond Box Company, bankrupt, and Pacific Transportation Company, Raymond Transfer & Cold Storage Company, Cram Lumber Company, Raymond Foundry & Machine Company, Bell Brothers Hardware Company, Siler Mill Company, Willapa Lumber Company, W. W. Wood Company, Pierce Brothers, J. E. Gardner, Standard Tow Boat Com-

pany, Case Shingle & Lumber Company, Quinault Lumber Company, Lebam Mill & Timber Company, Fern Creek Lumber Company, Gus Bacopolus, Mike Daniel, Victor Agren, Wm. A. Clerk, Jim Hamalas, Gus Pansgas, Abe Taylor, F. H. Hesmer, L. E. Owens, Miles H. Leach, John Chepas, E. M. Hatch, Chas. Herman, Ethel Owens, J. A. Schultz, R. N. Skinner, Strat Nelson, Joseph Hatch, H. F. Klimmer, L. H. Osborne, Jim Jamison, E. Norwick, Frank Walan, James Argeris, Arthur Bailey, Frank Sholes, Ben Vanderflow and Ed Leacock, and each of [108] them in the full and just sum of Five Hundred ($500.00) Dollars, to be paid to the said A. S. Coats, as trustee aforesaid, and Pacific Transportation Company, Raymond Transfer & Cold Storage Company, Cram Lumber Company, Raymond Foundry & Machine Company, Bell Brothers Hardware Company, Siler Mill Company, Willapa Lumber Company, W. W. Wood Company, Pierce Brothers, J. E. Gardner, Standard Tow Boat Company, Case Shingle & Lumber Company, Quinault Lumber Company, Lebam Mill & Timber Company, Fern Creek Lumber Company, Gus Bacopolus, Mike Daniel, Victor Agren, Wm. A. Clark, Jim Hamalas, Gus Pansgas, Abe Taylor, F. H. Hesmer, L. E. Owens, Miles H. Leach, John Chepas, E. M. Hatch, Chas. Herman, Ethel Owens, J. A. Schultz, R. N. Skinner, Strat Nelson, Joseph Hatch, H. F. Klimmer, L. H. Osborne, Jim Jamison, E. Norwick, Frank Walan, James Argeris, Arthur Bailey, Frank Sholes, Ben Vanderflow and Ed Leacock, their attorneys or assigns, for which payment well and truly to be made we bind

ourselves, our representatives, successors and assigns jointly and severally firmly by these presents.

Sealed with our seal and dated this 20th day of September, 1912.

WHEREAS, at a session of the District Court of the United States, for the Western District of Washington, Southern Division, in a suit in bankruptcy pending in said court, to wit: In the Matter of the Raymond Box Company, Bankrupt, an order and decree was rendered on the 20th day of September, 1912, wherein and whereby said Court did adjudge a certain mortgage described in the petition of the Pacific State Bank to be invalid and of no effect for want of a proper acknowledgment and for lack of authority in the [109] president and secretary to execute the same, and the claim of the Pacific State Bank for a preference, based upon said mortgage, was rejected, and the Pacific State Bank having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse said decree and order, and a citation directed to the said A. S. Coats, Pacific Transportation Company, Raymond Transfer & Cold Storage Company, Cram Lumber Company, Raymond Foundry & Machine Company, Bell Brothers Hardware Company, Siler Mill Company, Willapa Lumber Company, W. W. Wood Company, Pierce Brothers, J. E. Gardner, Standard Tow Boat Company, Case Shingle & Lumber Company, Quinault Lumber Company, Lebam Mill & Timber Company, Fern Creek Lumber Company, Gus Bacopolus, Mike Daniel, Victor Agren, Wm. A. Clark, Jim Hamalas,

Gus Pansgas, Abe Taylor, F. H. Hesmer, L. E. Owens, Miles H. Leach, John Chepas, E. M. Hatch, Chas. Herman, Ethel Owens, J. A. Schultz, R. N. Skinner, Strat Nelson, Joseph Hatch, H. F. Klimmer, L. H. Osborne, Jim Jamison, E. Norwick, Frank Walan, James Argeris, Arthur Bailey, Frank Sholes, Ben Vanderflow and Ed Leacock, is about to be issued citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California.

NOW, THEREFORE, the condition of the above obligation is such that if the said Pacific State Bank shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be [110] void, otherwise to remain in full force and effect.

PACIFIC STATE BANK,
By JOSEPH G. HEIM, Pres., Principal.
AMERICAN BONDING COMPANY
OF BALTIMORE, MD.
By JOSEPH G. HEIM,
Local Vice-Pres., Surety.

[Seal] Attest: H. W. B. HEWEN,
Local Secretary.

Sufficiency of sureties on the foregoing bond approved this 20th day of September, 1912.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Sep. 20, 1912. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." [111]

Certificate [of Clerk U. S. District Court to Record, etc.].

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing and attached papers are a true and correct copy of the record and proceedings in the case of In the Matter of Raymond Box Company, Bankrupt, No. 1054, as required by the stipulation of counsel filed in said cause, as the originals thereof appear on file in said court, at the City of Tacoma, in said District.

I do further certify that I hereto attach and herewith transmit the original Citation, with acknowledgment of service thereon;

And I further certify the cost of preparing and certifying the foregoing record to be the sum of Forty-six Dollars and ten cents ($46.10), which sum has been paid to me by the attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Tacoma, in said District, this tenth day of October, A. D. 1912.

[Seal] FRANK L. CROSBY,
Clerk.

By E. C. Ellington,
Deputy Clerk. [112]

[Endorsed]: No. 2193. United States Circuit Court of Appeals for the Ninth Circuit. The Pacific State Bank, a Corporation, Appellant, vs. A. S. Coats, as Trustee in Bankruptcy of Raymond Box Company, a Corporation, Bankrupt, et al., Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Western Division.

Received October 14, 1912.

F. D. MONCKTON,
Clerk.

Filed October 16, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 1054.

In the Matter of the RAYMOND BOX COMPANY, Bankrupt.

Citation.

United States of America,—ss.

The President of the United States to A. S. Coats, as Trustee in Bankruptcy of Raymond Box Company, and to Pacific Transportation Company, Raymond Transfer & Cold Storage Company, Cram Lumber Company, Raymond

Foundry & Machine Company, Bell Brothers Hardware Company, Siler Mill Company, Willapa Lumber Company, W. W. Wood Company, Pierce Brothers, J. E. Gardner, Standard Tow Boat Company, Case Shingle & Lumber Company, Quinault Lumber Company, Lebam Mill & Lumber Company, Fern Creek Lumber Company, Gus Bacopolus, Mike Daniel, Victor Agren, Wm. A. Clark, Jim Hamalas, Gus Pansgas, Abe Taylor, F. H. Hesmer, L. E. Owen, Miles H. Leach, John Chepas, E. M. Hatch, Chas. Herman, Ethel Owens, J. A. Schultz, R. N. Skinner, Strat Nelson, Joseph Hatch, H. F. Klimmer, L. H. Osborne, Jim Jamison, E. Norwick, Frank Walan, James Argeris, Arthur Bailey, Frank Sholes, Ben Vanderflow and Ed. Leacock:

YOU ARE HEREBY cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the office of the clerk of the District Court of the United States, for the Western District of Washington, Southern Division, wherein the Pacific State Bank is plaintiff and you are defendants in error in a certain matter entitled "In the Matter of the Raymond Box Company, Bankrupt," to show cause, if any there be, why the order and decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable EDWARD E. CUSHMAN,

United States District Judge for the Western District of Washington, at Tacoma, in said District, this 23d day of September, A. D. 1912, as of September 20, 1912.

[Seal] EDWARD E. CUSHMAN,

United States District Judge for the Western District of Washington, Residing at Tacoma, in Said District.

Service of the foregoing citation is hereby accepted this 25th day of September, 1912.

CHAS. E. MILLER,

Attorney for A. S. Coats, Trustee in Bankruptcy.

WELSH & WELSH,

Attorney for Pacific Transportation Co., Raymond Transfer & Cold Storage Co., Cram Lbr. Co., Raymond Foundry & Machine Co., Bell Bros. Hardware Co., Siler Mill Co., Willapa Lbr. Co., W. W. Wood Co., Pierce Bros., J. E. Gardner, Standard Tow Boat Co., Case Shingle & Lbr. Co., Quinault Lbr. Co., Lebam Mill & Lbr. Co., Fern Creek Lbr. Co., Gus Bacopolus, Mike Daniel, Victor Agren, Wm. A. Clark, Jim Hamalas, Gus Pansgas, Abe Taylor, F. H. Hesmer, L. E. Owen, Miles H. Leach, John Chepas, E. M. Hatch, Chas. Herman, Ethel Owens, J. A. Schultz, R. N. Skinner, Strat Nelson, Joseph Hatch, H. F. Klimmer, L. H. Osborne, Jim Jamison, E. Norwick, Frank Walan, James Argeris, Arthur Bailey, Frank Sholes, Ben Vanderflow and Ed. Leacock.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Raymond Box Company, Bankrupt. Citation. Filed U. S. District Court, Western District of Washington. Sep. 28, 1912. Frank L. Crosby, Clerk. E. C. Ellington, Deputy.

No. 2193. United States Circuit Court of Appeals for the Ninth Circuit. Received Oct. 12, 1912. F. D. Monckton, Clerk. Filed Oct. 16, 1912. F. D. Monckton, Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE PACIFIC STATE BANK, a corporation,
Appellant,

vs.

A. S. COATES, as trustee in Bankruptcy of RAYMOND BOX COMPANY, a corporation, bankrupt,
Appellee.

No.....

STATEMENT OF CASE.

The questions before this court arose out of the application of the Pacific State Bank, appellant, addressed to the bankruptcy court below, for leave to foreclose its mortgage. As appears by an inspection of the petition, the application of The Pacific State Bank was in the alternate, first asking leave to foreclose in the State court, but if the court should be of the opinion that such foreclosure should be in the bankruptcy court, then asking that the amount of the indebtedness be ascertained, its mortgage adjudged a valid mortgage lien, and the property sold for the satisfaction thereof. (See Record, pages 2 to 17).

The referee in bankruptcy granted leave to foreclose the mortgage in the State court without considering any question of validity. The matter was taken to the District Court for review and Judge

Hanford announced orally that he would reverse the decision of the referee, but would not determine any question of the validity of the mortgage unless it would be agreed by the parties he should do so. The bank then filed its claim as a preferred claim and joined with the trustee in bankruptcy in a stipulation that the Court should determine the validity of the mortgage. Thereafter a decree was entered by the Court denying leave to foreclose in the State Court, and adjudging that the mortgage was invalid and of no effect for want of proper acknowledgment and for lack of authority in the president and secretary to execute the same, but allowing the claim of the Pacific State Bank as a general claim. (Record, page 106).

There is no controversy of fact involved in this appeal. Both by the pleadings and by the stipulation of the parties (Record, page 86) every question of fact is fully agreed upon and the decision of Judge Hanford, and the order entered by Judge Cushman pursuant thereto, were in the light of these agreed facts.

The indebtedness from the bankrupt to the petitioner amounts to $22,351.71, with interest from October 1, 1911, at eight per cent per annum. To secure that indebtedness, an instrument in form set out on pages 18 to 24 of the record, was executed in the name of the Raymond Box Company by J. A. Heath, its president, attested by Miles H. Leach, its secretary, with the genuine corporate seal of the Raymond Box Company attached. (See answers, Record, pages 29 and 46. Stipulation, 86). This

instrument was verified as required by statute with relation to chattel mortgages, and it was acknowledged in the form set out on pages 22 and 23 of the record, and hereinafter set out.

The form of the acknowledgment (if not taken in connection with the verification) did not contain any oath. Heath, the president, and Leach, the secretary, respectively, held such offices and were the sole trustees and the sole stockholders of the corporation. (Affidavit of Leach, Record, page 68). Prior to the execution of this instrument, Heath, the president, had agreed to sell an undivided interest in a portion of his stock, under an agreement whereby he was to retain the voting power (Record, page 82), but according to a judgment of the Superior Court of Pacific County Heath had, prior to the execution of the mortgage herein, converted this stock to his own use, and judgment was rendered against him for its value in the sum of $2644.00. (Record, pages 69 to 75).

There is no controversy in the record that, excepting as just above stated, Heath and Leach owned all of the stock of the company and were the only trustees and officers thereof.

The lower Court was of the opinion that the mortgage was invalid, first because it was not authorized, according to the record, by act of the Board of Trustees as an organized body, and second, because the acknowledgment was insufficient under the Statute. (Opns. Record, 92 and following pages. See particularly page 105).

It is undisputed that all of the creditors of the

bankrupt other than the Pacific State Bank, have become such subsequent to the date of the mortgage. (Record, 34 and 88).

ASSIGNMENT OF ERRORS.

1. The Court erred in adjudging that the mortgage of the petitioner, The Pacific State Bank, is invalid and of no effect.

2. The Court erred in adjudging that the mortgage of the petitioner, the Pacific State Bank, was invalid for want of a proper acknowledgment, and erred in holding and adjudging that the said mortgage was not properly acknowledged.

3. The Court erred in adjudging that the mortgage of the petitioner, the Pacific State Bank, was invalid and of no effect for lack of authority in the President and Secretary to execute the same, and in holding and adjudging that the President and Secretary of the Raymond Box Company did not have authority to execute said mortgage.

4. The Court erred in adjudging that the claim of the Pacific State Bank for preference, based upon its mortgage, be rejected.

5. The Court erred in entering its order of September 20, 1912, in favor of the trustee in bankruptcy and against the petitioner.

ARGUMENT.

The opinion of the trial court and the judgment show that there were two grounds on which the mortgage was held invalid; first, that there was a lack of authority in the officers who executed the instrument on behalf of the corporation; and second, that the

acknowledgment was fatally defective, and therefore the mortgage was invalid.

The assignments of error must almost necessarily be discussed together. For the purpose of making clear the argument to sustain our position, we propose to discuss the questions arising under the following heads, to-wit:

I.

ALLEGED LACK OF AUTHORITY.

It is undisputed that the officers signing on behalf of the corporation are respectively president and secretary, and the only trustees of the company, and that the seal attached is the corporate seal. (Record, pages 30, 46, 82). Also that the instrument itself recites that the act of the officers is by authority of the Board of Trustees. (Record, pages 23, 87).

It is also undisputed that the two men who signed as president and secretary are all of the stockholders of record in the company (Record, page 68); and that the mortgage was made to secure a bona fide debt. (Record, page 82 and page 103).

Under these circumstances we are inclined to venture the assertion that there is no reported case which holds that an instrument of this kind is invalid for lack of corporate authority.

In *Cook on Corporations,* 6th Ed., Sec. 722, it is stated:

> "When proof is given that an instrument was signed by the corporate officers, and that the seal attached is the corporate seal, the courts will presume that the seal

was affixed by proper authority, and that the execution was duly authorized, but this presumption may be overthrown by proof that the seal was affixed without proper authority from the board of directors or some other duly authorized corporate agency."

This statement we believe to be elementary law.

In the case of *Milton vs. Crawford*, 65 Wash., 152, the following language is used:

"It is claimed that there is nothing in the abstract to show that Pratt and Rickard, who executed the deed to Stuht, Crawford's grantor, as president and secretary of the corporation, were authorized to do so either by resolution of the trustees or by the by-laws of the corporation. The officers who executed the deed as the act of the corporation were the appropriate officers. The instrument was authenticated by the seal of the corporation. Under such circumstances, the law presumes that the conveyance was authorized, and it was not necessary to produce further evidence to make a prima facie showing of authority.

" 'A very extensive principle in the law of corporations applicable to every kind of written contract executed ostensibly by the corporation, and to every kind of act done by its officers and agents in its behalf, is that, where the officer or agent is the ap-

propriate officer or agent to execute a contract, or to do an act of a particular kind, in behalf of the corporation, the law presumes a precedent authorization, regularly and rightfully made, and it is not necessary to produce *evidence* of such authority from the records of the corporation. Under the operation of this principle, a deed or mortgage, purporting to have been executed by a corporation, which is signed and acknowledged in its behalf by its president and secretary, will be presumed to have been executed by its authority. So proof of the signatures of the officers of a corporation to a release *under seal* purporting to have been executed by the corporation, is *prima facie* evidence of its due execution. So where an undertaking on appeal, purporting to have been executed by the corporation as *surety* was signed by its second vice-president and its assistant secretary, with the corporate *seal* affixed, the authority of the officers to execute the instrument was presumed in absence of evidence to the contrary. *4 Thompson Corp.* (1st Ed.) Sec. 5029.'

"See also: *Gorder vs. Plattsmouth Canning Co.*, 36 Neb., 548; 54 N. W., 830; *Whitney vs. Union Trust Co.*, 65 N. Y., 576; *Hutchins vs. Byrnes*, 9 Gray, 367; *Murphy vs. Welch*, 128 Mass., 489; *Hamilton vs. McLaughlin*, 145 Mass., 20; 12 N. E., 424; *Morris vs. Keil*, 20 Minn, 531; *Yanish vs. Pioneer Fuel Co.*, 64 Minn., 175; 66 N. W., 198;

Watkins vs. Glas, 5 Cal. App., 68; 89 Pac., 840."

See also *Clark & Marshall on Corporations*, Vol. 4, page 212.

By a long line of decisions, the Supreme Court of the State of Washington has followed the general rule stated in the text books cited above.

The result of the cases in this state, as well as elsewhere, is that wherever the corporation has received the benefit of a transaction, or wherever it has permitted its officers generally to execute instruments, whatever they may be, or to transact business without specific authority from the board, or wherever all of the stockholders of the corporation have knowledge of the transaction and have not seasonably objected, the company itself is estopped to set up the invalidity of the act.

Roy vs. Scott, 11 Wash., 399.

Dexter-Horton Co., vs. Long, 2 Wash., 435.

Leslie vs. Wilshire, 6 Wash., 282.

Kirwin vs. Washington Match Co., 37 Wash., 285.

West Seattle Land & Imp. Co., vs. Novelty Mill Co., 31 Wash., 435.

Atlantic Trust Co. vs. Behrend, 15 Wash., 466.

Parker vs. Hill, 68 Wash., (op.) 146.

In the light of these cases, it is illuminative to read the following taken from the supplemental opinion of the trial judge:

"In my study of the case I did not fail to notice the important fact that the

> claim of the bank is for a bona fide debt, due and owing to it by the bankrupt corporation; that credit was given by the bank to the corporation in reliance upon the instrument purporting to be a mortgage which the parties thereto believed had been executed with due formality and constituted a valid lien; that it is conceded by all the litigants in this case that said instrument was in fact signed, sealed with the corporate seal, acknowledged, certified, delivered and recorded at the times and in the manner indicated by the instrument itself and the endorsements thereon; and that the testificandum clause recites that its execution by its president and secretary was authorized by the Board of Trustees."

The affidavit of Leach (Transcript, page 68) shows that the men who executed the instrument were not only the president and secretary, respectively, but were the sole trustees and sole stockholders of the company making the mortgage. Reference will doubtless be made by the appellees to the finding of facts, conclusions and judgment in the MacKenzie case (Record, pages 69 and 73), and we deem it proper briefly to call the attention of the court to those findings and the judgment predicated thereon. In the first place, it will be noted that the Raymond Box Company was not a party to or bound by the judgment, and there is nothing in the findings or judgment which disputes the affidavit of Mr. Leach, showing that the only stockholders of record were

Leach and Heath. On the contrary, the findings show that Heath was to retain the voting power of the stock. The most that the findings and judgment referred to show is that Heath made an agreement to sell a part of his stock and breached his contract and converted the stock to his own use, and MacKenzie's decedent became entitled to damages for the breach of the contract, and, in fact, was awarded judgment therefor. It will be noted that MacKenzie was not awarded the stock, or any interest therein, *but was awarded a judgment because his decedent did not get what he contracted to get.* It is too clear for serious argument thatMacKenzie's decedent was not entitled to any of the rights of a stockholder. Had there been a stockholder's meeting to pass upon the mortgage in question, who would have appeared to represent the stock which stood in the name of Heath? Obviously, Heath would have appeared. It may be true that Heath had not acquired or retained his stock honestly, but the company knew nothing about that. The company only knew Mr. Heath. It did not know MacKenzie's decedent. Even if Heath had not breached his contract, yet he was to have his voting power. Therefore, Heath would have voted. But while he did not vote, so far as the record shows, upon this question, yet under the authorities from the beginning of corporation law down to the present time and in all the states, including the State of Washington, where this corporation is organized and exists and where the property is located, the Heath stock was concluded on the principle of estoppel, by

the action of Heath in participating in the execution of the mortgage and the expenditure of the money secured thereby.

If it is true, under the facts found by the trial judge and admitted by all parties, that an instrument executed by the sole officers, sole trustees and sole stockholders of the corporation is invalid because the gentlemen who held these various positions did not pass a formal resolution, then we are led to conclude that the administration of the law has reached such a point of technicality that business men should never take any step, except under the advice, direction and personal knowledge of a corporation lawyer. The opinion of the trial judge in its last analysis on this branch of the case holds that the board of trustees must not only meet as a board, but they must meet formally and not informally, because the record in this case shows in a convincing manner that the board did, in point of fact, meet and did resolve to execute, though perhaps informally, and did execute the instrument in question. The certificate of the notary public made under his notarial seal shows that the president and the secretary executed and acknowledged it. The affidavit of the president and secretary is one affidavit, not two affidavits, and it would be strange construction for the court to presume, in order to destroy the validity of the instrument, that these things were done separately and not together, and unless they were done separately the board must have been in session as a board.

It is too well settled to require any authority,

or more than a suggestion, that the minutes of the meeting of the board of trustees or other body are not the only evidence of the action of the board, and we believe that even if the highly technical construction of the requirements for valid corporate action adopted by the trial judge should be sustained, yet the evidence in this case shows enough to create the irresistable presumption that a corporate meeting was in fact held.

The rule adopted by the trial judge in this respect is opposed to what every court knows, as a matter of common knowledge, is the well nigh universal practice of small corporations doing business in this country. It is frequently stated in text books and in opinions of courts, and in the discussion of economic questions by students of such questions, that the growth of small business corporations in this country, which has so characterized the latter years of the development of business in the country, is accounted for by the great convenience of so doing business. If it is true that two individuals holding all of the stock, constituting the whole board of trustees and holding all the offices of the corporation cannot bind the corporation without formally calling a meeting to order, formally making a motion, formally adopting it and formally placing it upon the minutes, then the convenience supposed to be one of the strong characteristics of doing business through the medium of a corporation is a myth. Instead of a convenience, it is a pitfall, and a trap to catch the unwary, and if the formalities thus required are insisted upon, it is the very antithesis of

convenience; it is a cumbersome, unwieldly, insecure and slow method of transacting the business affairs of life.

Livieratos vs. Commonwealth, etc., Co., 57 Wash., (op.) 379-80.

II.

ALLEGED DEFECTIVE ACKNOWLEDGMENT.

(a) *Assuming that the acknowledgment was defective, the trustee in bankruptcy who represented only creditors who became such subsequent to the date of the mortgage, could not object to its validity either as a real or a chattel mortgage.*

The trial court held that the mortgage, even if authorized, was invalid because not acknowledged in accordance with the statute. The alleged invalidity consists in the failure of the notary to certify that the officers were such officers and under oath stated that they were authorized to execute the instrument and that the seal affixed was the seal of the corporation. (Record, page 98). We think it best to assume first, that the acknowledgment was irregular, and to discuss the question whether so assuming, the trustee in bankruptcy representing only subsequent creditors can raise the question, and thereafter to discuss the terms of the acknowledgment itself.

Section 47a of the Federal Bankruptcy Statutes as amended by 1910, provides that:

> "Such trustee, as to all property in the custody or coming into the custody of the

bankruptcy court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

It is settled that a trustee in bankruptcy has the rights and only the rights which the creditors whom he represents would have had, had not bankruptcy intervened, and had the creditors reduced their claims to judgment.

In re Bazemore, 189 Fed., 236.
Chilberg vs. Smith, 174 Fed., 806.
In re Nelson, 191 Fed., 233.

It is clear that Section 47a, set out above, was not intended to create new rights in creditors, or extend rights, but in legal effect was to preserve the rights that creditors might have exercised against the bankrupt, had not bankruptcy proceedings intervened. If it is true that had the company not become bankrupt and had the existing creditors reduced their claims to judgment, the judgment would still be inferior and subject to the mortgage of the appellant, then it is true that the trustee in bankruptcy who only represents the creditors has no better position.

The statutes of this state regarding acknowledg-

ments so far as applicable to this case are found in the following:

(*Rem. & Bal. Code*, Sec. 8745).

"All conveyances of real estate or of any interest therein, and all contracts creating or evidencing any encumbrance upon real estate, shall be by deed."

(*Rem. & Bal. Code*, Sec. 8746).

"A deed shall be in writing, signed by the party bound thereby, and acknowledged by the party making it, before some person authorized by the laws of this state to take the acknowledgment of deeds."

(*Rem. & Bal. Code*, Sec. 8759).

"The person or officer taking such acknowledgment shall certify the same by a certificate written on or annexed to said mortgage, deed or instrument, which certificate shall be under his official seal, if any he has, and such certificate shall recite in substance that the deed, mortgage or instrument was acknowledged by the person or persons whose name or names are signed thereto as grantor or principal, before him as such officer, with the date of such acknowledgment."

(*Rem. and Bal. Code*, Sec. 8761).

"A certificate of acknowledgment, substantially in the following form shall be sufficient:

State of Washington, }
County of..... } ss.

I (here give name of officer and official title) do hereby certify that on this..... day of....., 18..., personally appeared before me (name of grantor, and if acknowledged by wife, her name, and add "his wife"), to me known to be the individual or individuals described in and who executed the within instrument, and acknowledged that he (she or they) signed and sealed the same as his (her or their) free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this.....day of.....A. D. 18....

.....

(Signature of officer)."

(*Rem. & Bal. Code*, Sec. 8761½).

"Certificates of acknowledgment of an instrument acknowledged by a corporation substantially in the following form shall, be sufficient:

State of..... }
County of..... } ss.

On this.....day of .....A. D...., before me personally appeared..... to me known to be the (President, Vice-President, Secretary, Treasurer, or other authorized officer or agent, as the case may be) of the corporation that executed the

within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

. . . . . .

(Signature and title of officer)."

The mortgage, the validity of which is here in question, covers both real and chattel property, though consideration of that fact does not seem to have been given by the trial court. A reference to the statutes of Washington shows that different questions arise in determining its vaildity as a chattel mortgage from the questions which arise in determining its validity as a real mortgage. Some of the questions, however, are the same, and so far as they can be discussed together, we propose to so discuss them. The statute providing for the acknowledgment and record of chattel mortgages is as follows:

(*Rem. & Bal. Code*, Sec. 3660).

"A mortgage of personal property is void as against *creditors of the mortgagor* or *subsequent purchasers and encumbrancers* of the property for value and in good faith

> unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property."

The statute providing for the recording of deeds, mortgages, etc., is as follows:

(*Rem. & Bal. Code,* Sec. 8781).

> "All deeds, mortgages, and assignments of mortgages, shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid as against bona fide purchasers from the date of their filing for record in said office; and when so filed shall be notice to all the world."

Referring to *Rem. & Bal. Code,* Sec. 3660, as to chattel mortgages, the court will note that the mortgage is not void generally, but only as against creditors, subsequent purchasers, and encumbrancers of the property for value and in good faith. *There are no subsequent purchasers or encumbrancers in this case,* and the mortgage, if void as a chattel mortgage, is so only as against creditors. The record shows without dispute that all of the creditors became such after the execution and recording of the mortgage now in question. If the mortgage is invalid as a chattel mortgage at all, it must be as against these subsequent creditors. But the Supreme

Court of the State of Washington has twice held that the language of section 3660 refers only to persons *who were creditors at the time of the execution of the mortgage and does not refer to subsequent creditors.* See *Roy vs. Scott,* 11 Wash., 399, where the court uses this language:

> "The word 'subsequent' relates not to creditors, but to purchasers and encumbrancers. As between mortgagor and mortgagee the instrument is valid and binding as a mortgage without the affidavit, and McNaught, being at that time a mere stranger to the property and having no interest in it, cannot invoke the aid of the statute, which favors a class to which he does not belong."

McNaught was a subsequent creditor. The mortgage was also held valid as to Johnson, a subsequent encumbrancer.

See also *Urquhart vs. Cross,* 60 Wash., 249.

It is beyond doubt the law of this state, as determined by its highest court, that the statute requiring the acknowledgment of a chattel mortgage and an affidavit of good faith invalidates the mortgage for want of compliance therewith *only in favor of creditors who were such at the time of the giving of the mortgage.* As there are no such creditors here, we think the mortgage must be sustained as a chattel mortgage.

Section 8781, *Rem. & Bal. Code,* taken in connection with Section 8746, *Rem. & Bal. Code,* makes

real estate mortgages valid *as to bona fide purchasers* when they have been acknowledged and recorded. We think it clear that the effect of the statutes, so far as they relate to mortgages of real property is that they are valid as to all *except* bona fide purchasers when they are executed and delivered whether they are acknowledged or recorded or not. It is free of doubt that a deed or mortgage not acknowledged, or defectively acknowledged, in this state is operative against the grantor and his heirs and those claiming under him:

Edson vs. Knox, 8 Wash., 642.
Carson vs. Thompson, 10 Wash., 295.
Matson vs. Johnson, 48 Wash., 256.
Little vs. Gibb, 57 Wash., 92.

It is also clear under our statutes that judgment creditors have liens only on the actual interest of the judgment debtor, and on purchasing at their own sales are not *bona fide* purchasers.

Dawson vs. McCarty, 21 Wash., 314.
Woodhurst vs. Cramer, 29 Wash., 48.
Book vs. Willey, 8 Wash., 267.
Matson vs. Johnson, 48 Wash., 256.
Hacker vs. White, 22 Wash., 415.
Am. Savings & Trust Co. vs. Helgeson, 64 Wash., 54, Op. 64; 67 Wash., 575-6-7.

In the last cited case the Supreme Court says:

"A little consideration makes it equally plain that the appellant Helgesen stands in no better position than the Ericksons. He claimed under a judgment lien. He was an

execution creditor purchasing at his own sale. Under the established rule in this state, he was not a bona fide purchaser. He took no greater rights than the execution debtor had. His judgment was a lien upon the real, not the apparent interest of the debtor."

In the case of *Dawson vs. McCarty*, supra, and *Hacker vs. White*, 22 Wash., 415, it is held that an unrecorded mortgage or deed is entitled to priority over a subsequent judgment.

In the case of *Woodhurst vs. Cramer*, supra, it is held that where a mortgage has been formally released of record though not actually paid, such mortgage is entitled to priority over a subsequent judgment.

Since the trustee in bankruptcy takes only the rights which the creditors whom he represents would have had, had not bankruptcy intervened, and since it appears that this mortgage so far as it is a real estate mortgage would prevail in the state courts, even if it were not acknowledged and not recorded, it seems clear that the trustee's rights are subsequent and inferior to the rights of the mortgagee.

(b) *The policy of the statutes of this state and of the courts is liberal with the view to sustaining the intent of the parties and in line therewith the courts consider the entire instrument and all its recitations in order to determine its validity.*

The policy of the statutes of this state from the formation of the state down to this time has been

towards liberality in requirement of acknowledgments and in the execution of instruments generally. This is illustrated not only by various curative statutes, but by Section 8784, *Rem. & Bal. Code,* as follows:

> "Every instrument in writing purporting to convey or encumber real property, which has been recorded in the proper auditor's office, although such instrument may not have been executed and acknowledged in accordance with the law in force at the time of its execution, shall impart the same notice to third persons, from the date of recording, as if the instrument had been executed, acknowledged and recorded in accordance with the laws regulating the execution, acknowledgment, and recording of such instrument then in force."

See also *Rem. & Bal. Code,* 8757, 8764.

The construction of the statutes of this state by the Supreme Court has uniformly been in accord with the liberal policy of the statutes themselves. In the case of *Bloomingdale vs. Weil,* 29 Wash., 634, a foreign acknowledgment taken without an official seal and without a certificate of a court of record was upheld. The court held that there was a proper acknowledgment, but a defective certification, and that such fact did not affect its operative force, at least in equity, as against the grantor or one who is not a bona fide purchaser.

In the case of *Carson vs. Thompson,* 10 Wash.,

295, the Supreme Court, in sustaining a deed improperly witnessed, used this language:

> "It is evident therefrom that the settled policy of the law was to render valid and give force and effect to all conveyances voluntarily and in good faith signed by the grantors, and not to render such deeds ineffectual in consequence of an informality or defect as to the proof of their execution, and such purpose has been further recognized and continued by subsequent legislative acts. It is evidence that the signature of the grantor was regarded as the important and essential thing. An acknowledgment of an instrument is but a manner or form of attesting its execution. The requirement of witnesses is but another, although additional form of attesting it."

The mortgage in controversy was executed in the State of Washington and related to Washington property. The corporation making the mortgage is a Washington corporation. The bankruptcy proceeding is in the Federal Court for the Western District of Washington. Bearing always in mind that the bankruptcy statute is not intended to give new rights, but is only a method of winding up the assets of the corporation which has become insolvent in such manner as to preserve the rights of all parties, and that the question in every case is what rights would the creditors represented by the Trustee in bankruptcy have in the state courts, we contend that from the policy of the statutes and of

the courts of this state the rights under appellant's mortgage are property rights which the Federal Court should respect, and if from the foregoing the court is of the opinion that in the Supreme Court of the State of Washington the appellant's mortgage would be upheld, we are entitled upon that ground alone to have the mortgage upheld in this court.

The instrument under consideration begins as follows:

> "This Indenture, made this 2nd day of December, 1910, between the Raymond Box Company, a corporation organized and existing under the laws of the State of Washington, party of the first part, and the Pacific State Bank, also a corporation, organized and existing under the laws of the State of Washington, party of the second part."
>
> (Record, page 18).

The witnessing clause of the mortgage and the signatures, acknowledgment, and affidavit of good faith are in the following form:

> "In Witness Whereof, the said party of the first part has hereunto affixed its corporate seal and these presents to be affected by its President and Secretary with the authority of the Board of Trustees.
>
> Raymond Box Company,
> By J. A. Heath, President.
>
> Attest:
> Miles H. Leach, Secetary.
>
> (Seal of the Corporation.)

STATE OF WASHINGTON, } ss.
County of Pacific. }

Be it remembered that on this 2nd day of December, 1910, before me, the undersigned, a notary public in and for the State of Washington, personally appeared the within named J. A. Heath and Miles H. Leach, each to me well known to be the identical persons above named and whose names are subscribed to the within and foregoing instrument, the said J. A. Heath as President and the said Miles H. Leach, as Secretary of said corporation, and the said J. A. Heath acknowledged to me then and there that he as president of said corporation had affixed said name, together with his own name, freely and voluntarily, as his free act and deed, and the free act and deed of said corporation; and the said Miles H. Leach also then and there acknowledged to me that he as secretary of said corporation, had signed the above instrument as secretary of said corporation as his free and voluntary act and deed and the free and voluntary act and deed of the said corporation.

WITNESS my hand and official seal.

H. W. B. HEWEN,

Notary Public, residing at South Bend, Washington.

(Notarial Seal)

AFFIDAVIT.

STATE OF WASHINGTON, } ss.
County of Pacific. }

WE, J. A. HEATH and MILES H. LEACH, President and Secretary respectively of the Raymond Box Company, a corporation, the above named mortgagor, after being duly sworn on oath, say that the foregoing mortgage is made in good faith and without any desire to hinder, delay or defraud creditors.

MILES H. LEACH.
J. A. HEATH,

Sworn to and subscribed before me this 2nd day of December, 1910.

H. W. B. HEWEN,
Notary Public residing at South Bend, Washington.

(Notarial Seal)."

(Record, pages 18 to 24 inc.)

It is our contention that in determining the validity of the mortgage the entire instrument should be taken into consideration. From all of these recitals, it appears that the corporate seal was attached to the instrument and executed by the President and Secretary with the authority of the Board of Trustees; (see witnessing clause), that Heath and Leach, President and Secretary respectively, acknowledged said instrument as President and Secretary, as their free and voluntary deed and the free act and deed of the corporation, and that the mort-

gage was made in good faith without any design to hinder, delay or defraud creditors.

The case of *Deseret National Bank vs. Kidman*, 71 Pac., 873, was a case where it was claimed that the mortgage was insufficiently acknowledged because the certificate of acknowledgment did not state that the person who executed the mortgage was the same person who acknowledged its execution, but the Supreme Court of Idaho used this language:

> "In the case at bar, looking at the affidavit attached to the mortgage, immediately preceding the acknowledgment, we find from the jurat that the affidavit was subscribed and sworn to before the same notary public who took the acknowledgment of the mortgage. This certificate, read with this affidavit, clearly shows that the party who executed the mortgage was the same person who acknowledged the execution of the same."

Another instance of aiding the acknowledgment by looking at the other portions of the instrument is found in the opinion of Mr. Justice Field in the case of *Carpenter vs. Dexter*, 8 Wallace, 513-27; 19 L. Ed., 426, quoted from in the case last cited, where Mr. Justice Field says:

> "The law of Illinois in force in 1847 upon the manner of taking acknowledgments, provides that no officer shall take the acknowledgment of any person unless such person 'shall be personally known to him to

be the real person who (executed the deed) and in whose name such acknowledgment is proposed to be made, or shall be proved to be such by a creditable witness,' and such personal knowledge or proof shall be stated in the certificate. Looking now to the deed itself, we find that the attestation clause states that it was 'signed, sealed and delivered,' in the presence of the subscribing witnesses. One of these witnesses was the Justice of Peace before whom the acknowledgement was taken; and he states in his certificate, following immediately after the attestation clause, that the 'above named William T. Davenport, who has signed, sealed and delivered the above instrument of writing, personally appeared' before him and acknowledged the same to be his free act and deed. Read thus with the deed the certificate amounts to this: That the grantor personally appeared before the officer, and in his presence, signed, sealed and delivered the instrument, and then acknowledged the same before him. An affirmation in the words of the statute could not more clearly express the identity of the grantor with the party making the acknowledgment.''

A defect in the acknowledgment of a corporate instrument is overlooked by the courts if there is sufficient to indicate an intent to acknowledge. *Cook on Corporations*, 6th Ed., 722, and cases cited.

We insist that even if the form of acknowledgment set out in the statute is exclusive, the acknowledgment with the remainder of the instrument is a substantial compliance therewith, and the statute, by its terms, only requires a substantial compliance,

(c) *There is no actual irregularity in the acknowledgment.*

We contend, however, that the statutes of the state, so far as they prescribe the contents of an acknowledgment have been literally complied with. The only statute really prescribing what an acknowledgment *shall* contain is *Rem. & Bal. Code,* Sec. 8759, as follows:

> "The person or officer taking such acknowledgment shall certify the same by a certificate written on or annexed to said mortgage, deed, or instrument, which certificate shall be under his official seal, if any he has, and such certificate shall recite in substance that the deed, mortgage or instrument was acknowledged by the person or persons whose name or names are signed thereto as grantor or principal before him as such officer, with the date of such acknowledgment."

This section is taken from an act which relates to the acknowledgment of a foreign deed, but has been held applicable to a deed acknowledged within the state.

Forrester vs. Reliable Transfer Co., 59 Wash., 92.

Barring that section, the statutes do not anywhere prescribe the contents of an acknowledgment. Section 8761 contains a form for individual acknowledgment which the statute itself says *shall be sufficient, but does not make the form exclusive.* Section 8761½ contains a form for an acknowledgment of an instrument signed by a corporation which the statute says *shall be sufficient, but the statute does not make this form exclusive.* Attention is called to the fact that the language of the two sections just referred to is identical. In both it is declared that the forms set out are sufficient. In neither is the form made the exclusive form.

In the case of *Kley vs. Geiger,* 4 Wash., 484, the Supreme Court, passing upon the validity of a mortgage which was claimed to be defective because the acknowledgment, although it complied with Section 8759, did not comply with Section 8761 (being the same sections therein referred to as sections 1435 and 1437, general statutes) uses this language:

> "The objection to the acknowledgment is, that the officer before whom the same was taken did not certify that said defendants executed said mortgage freely and voluntarily. The acknowledgment does state that said parties appeared before such officer, and acknowledged that they signed and executed the same, and contains the further statement that upon the separate examination of the said Ida Geiger apart from her husband, she acknowledged that she signed

the same voluntarily. There is no force in the objection to the acknowledgment. Sec. 1435 of the General Statutes, which was in force at that time, provides that certificates of acknowledgment shall recite in substance that the deed, mortgage or instrument was acknowledged by the person or persons whose name or names are signed thereto as grantor. Sec. 1437, which was also in force at that time, provides that the certificate of acknowledgment substantially in the form there given shall be sufficient, which form contains a recital that the execution of the instrument was the free and voluntary act of the party executing the same. It does not provide that this form of acknowledgment shall be exclusive, and we are satisfied the acknowledgment which was taken wherein the defendants acknowledged that they signed and executed the mortgage without any further statement that they voluntarily did the same, was sufficient."

It is material to note that the decision just above referred to was rendered long prior to the time when the Legislature enacted Section 8761½, the latter section being incorporated in the Session Laws of 1903. The Legislature, therefore, had in mind when it enacted Section 8761½ the construction which the Supreme Court of this state had given to Section 8761. Nevertheless, the Legislature used the same language theretofore employed in Section 8761; that is, the Legislature prescribed a form which it

declared should be sufficient and the Supreme Court had already held that this language did not make the form exclusive. It seems clear that the Legislature intended that the form for corporate acknowledgments set out in Section 8761½ should be a guide to go by, but not exclusive of other forms which complied with existing statutes. Had it intended to make the form set out in 8761½ exclusive, it would not have used language prescribing the form which had already been construed by the Supreme Court not to be exclusive of other forms. It seems to us, therefore, to be clear that following the construction of the statutes of this state already given to the statutes by the Supreme Court, this court must uphold the acknowledgment as an exact and literal compliance with the statutes of the state.

If our argument just preceding is sound, then the acknowledgment is absolutely in accordance with the statute. *Rem. & Bal. Code,* 8759, headed "Certificate of foreign acknowledgments," but referring to foreign and domestic acknowledgments, (*Forrester vs. Reliable Transfer Company,* supra) requires that "the person or officer taking the acknowledgment shall certify the same by certificate written on or annexed to the mortgage.....under his official seal.....and shall recite in substance that the mortgage.....was acknowledged by the person or persons whose names are signed thereto as grantor or principal.....before such officer, with the date of such acknowledgment."

Every requirement of the statute has been lit-

erally complied with. If we are right in the foregoing argument that the corporation form set out in the statute is not exclusive, then there can be no contention based upon any reason, however technical or fine drawn, but that the mortgage in controversy is valid.

The object of the courts, especially in this state, has been to get at the actual intent of the parties. It has not been to draw fine distinctions which would invalidate instruments intended by the parties to bind them. The supplemental opinion of the trial court, setting out as it does that the parties signed, sealed, acknowledged and delivered the instrument to secure a bona fide debt, is the best argument possible, in view of the settled policy of this and other states, why it should be sustained as a valid mortgage.

We do not have in this case any question arising where a bona fide purchaser or incumbrancer, in ignorance of the facts, advanced money on the faith of the unincumbered ownership. These people are protected by the statute. We do not have here the case of an unrecorded instrument where the holder of the mortgage has, by his carelessness or fraud, led others to advance their money. As far as actual acknowledgment and actual recording could protect the subsequent creditors they have been protected. The points raised as to the validity of the instrument are highly technical. No one has been actually injured. Up to the time when a lawyer, looking for defects, examined the instrument with care and com-

pared the words of the acknowledgment with the optional form set out in the statute, nobody knew that there was any possibility of beating the mortgagee out of the money which he had advanced on the faith of this instrument. If the point is sustained, then the technicalities of the law are successfully set up to avoid the actual rights and the actual equities of the parties. We contend that the court should investigate the merits of the controversy with a view to determining the rights of these parties according to the actual intent and the actual meaning, and should be keen to uphold rather than keen to destroy the contract which was made.

Respectfully submitted,

H. W. B. Hewen,
Maurice A. Langhorne,
Elmer M. Hayden,
Attorneys for Appellant.

No. 2193

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE PACIFIC STATE BANK, a corporation,

Appellant,

vs.

A. S. COATES, as Trustee in Bankruptcy of Raymond Box Company, a corporation, bankrupt, et al,

Appellees.

STATEMENT OF THE CASE.

1. This case was tried in the court below, upon affidavits and stipulations as to certain agreed facts, all of which are made a part of the record and appear in the transcript.

2. The Pacific State Bank and the Raymond Box Company are, and each is a corporation organized and existing under and by virtue of the laws of the State of Washington.

3. That on the 2nd day of December, 1910, the Raymond Box Company was indebted to the Pacific State Bank in the sum of $23,400.00 and on said date J. A. Heath and Miles H. Leach, president and secretary, respectively, of the Raymond Box Company, executed and delivered to the Pacific State Bank the instruments purporting to be a promissory note and

mortgage and being the same mortgage the validity or lien of which, is in issue.

4. That said promissory note and mortgage were and each was given for a pre-existing indebtedness which the said Raymond Box Company owed to the said Pacific State Bank.

See affidavit of Samuel McMurran found on page 57 of Transcript of record and the same is as follows:

STATE OF WASHINGTON, }
COUNTY OF PACIFIC. } ss.

Samuel McMurran, being first duly sworn, upon oath deposes and says: That he is a resident of Raymond, Pacific County, Washington; that he is employed as bookkeeper for the W. W. Wood Company of this city; that he has had 25 years' experience as a bookkeeper.

That on or about the 15th day of February, 1912, A. S. Coats, who was then temporary receiver for the Raymond Box Company, and requested that he audit the books and prepare a statement, and that thereafter he did examine and audit said books and accounts of the Raymond Box Company, and from the audit so made, found, and now finds that the purported mortgage now held by the Pacific State Bank, and which the bank alleges was given by the Raymond Box Company to secure a note in the sum of $23,400.00 was given and dated on December 2, 1910, and was given for a pre-existing debt.

That at the time said purporting mortgage was

given as aforesaid, the amount due thereon was the only sum which the Raymond Box Company then owed and at that time it had no indebtedness whatever, except the amount due on said note and purported mortgage, and all of the accounts which it now owes and which was owing at the time it was adjudicated a bankrupt, have been created since the execution of said instrument, and said accounts in addition to the amount due to said bank, amount in the aggregate to about $14,000.00.

That all of the creditors shown on the statement filed in the above proceedings by A. S. Coats and all of the creditors which have presented claims in the above-entitled matter, became creditors of the Raymond Box Company after the execution of said purported mortgage.

SAMUEL McMURRAN.

Subscribed and sworn to before me this 15th day of April, A. D. 1912.

(Seal.)

MARTIN C. WELSH.

Notary Public in and for the State of Washington, Residing at Raymond, Washington.

5. It is stipulated by the parties that the value of the real and personal property described in said instrument claimed to be a mortgage, is approximately and does not exceed $20,000.00.

See page 88 of Transcript of record.

6. The property covered by the alleged mortgage

is practically all of the property of the bankrupt corporation.

See allegations 6 and 7 of Appellant's petition, pages 6 and 7 of Transcript.

7. That there was due on said purported mortgage from the bankrupt corporation to the Pacific State Bank, on the 18th of March, 1912, $22,357.71, with interest from October 1, 1911.

Stipulation pages 86 and 87 of Transcript.

8. That the value of the real and personal property covered by the mortgage does not exceed $20,000.00.

Stipulation page 88 of Transcript.

9. That the bankrupt corporation is indebted in the sum of about $14,000.00 to the answering creditors, other than the Pacific State Bank, and that all of said creditors became such subsequent to the execution of said instrument which appellant, claims to be a mortgage, and prior to the adjudication in bankruptcy, and that the following creditors had no actual knowledge of the fact of said alleged mortgage prior to the time that said bankrupt became indebted to them, to-wit:

Raymond Foundry & Machinery Company, Siler Mill Company, Willapa Lumber Company, W. W. Wood Company, Pearce Brothers and T. H. Bell.

Stipulation pages 88 and 89 of Transcript.

10. That at all times prior to the filing of the petition by the appellant for leave to foreclose, and at all times since and now the Trustee was and is in the

full actual and manual possession of all of the property of the bankrupt described in the mortgage.

Stipulation page 89 of Transcript.

11. That the purported mortgage was recorded in the real estate mortgage records of Pacific County, on December 8, 1910, and was filed on same date as a chattel mortgage, but was not recorded as such chattel mortgage.

Stipulation page 88 of Transcript.

12. The lower court held that the mortgage was void, and decreed that the claim of the Pacific State Bank be allowed as a general claim, and its claim for preference based upon its alleged mortgage be rejected.

Pages 92 to 107 of Transcript.

13. That J. A. Heath and M. H. Leach were not the sole owners of all of the stock of the bankrupt corporation at the time of the execution of this mortgage. The president, J. A. Heath, on or about May 1st, 1908, made an absolute sale of an undivided one-half interest in forty shares of the capital stock of the bankrupt corporation, the same to be delivered when the indebtedness of the bankrupt to the appellant was paid and the stock released; and that subsequent to the execution of this mortgage Effie McKenzie commenced an action against the said J. A. Heath to recover this stock or its value. (Record. T. P. 69, 70, 71, 72, 73 and 74).

From said judgment appellant has appealed.

ARGUMENT, POINTS AND AUTHORITIES.

The judgment of the court below should be affirmed for the following reasons:

FIRST.

The powers of the corporation are measured by its charter not only as to the things which it may lawfully do, but also as to the mode in which it may do them. If the charter requires the powers conferred to be exercised in a particular manner, or by particular officers or agents, and the provision is not merely directory, it can only exercise them in the mode pointed out.

7 A. & E. Enc. of Law (2nd Ed.) 701.
3 Washburn on Real Property (4th Ed.) 262.
U. S. Bank vs. Daubridge, 12 Wheat. 64.
Beatty v. Marine S. Co., 2 Johns, 109.
Pennsylvania L. R. Co. v. Board of Education, 20 W. Va. 360.

Under the laws of the State of Washington charters are not granted by the legislature to private corporations, but they are incorporated by the persons comprising the corporation voluntarily organizing and signing articles of incorporation under the general statute, and the charter of such corporation is necessarily the statutes relating to the formation of private corporations and the voluntary articles which are filed under them.

The general laws as to private corporations of the State of Washington may be briefly summarized as follows:

Section 3686 Rem. & Ball. Codes of Washington.

The corporate power of a corporation shall be exercised by a Board of not less than two trustees who shall be stockholders in the company, and at least one of them shall be a resident of the State of Washington, and a majority of them citizens of the United States, who shall, before entering upon the duties of the office, respectively take and subscribe to an oath as provided by the laws of this state, and who shall, after the expiration of the term of the trustees first elected, be annually elected by the stockholders, etc.

Section 3688, Idem, provides that a majority of the whole number of trustees shall constitute a board for the transaction of business, and every decision of a majority of the persons duly assembled as a board shall be valid as a corporate act.

Among the enumerated corporate powers vested in the corporation, section 3683, of the same code, provides: That such corporation shall have the power to purchase or mortgage, sell and convey real and personal property.

It will thus be seen that a private corporation in this state can only exercise powers as such by and through its Board of Trustees. Only the trustees have power to mortgage the property of the corporation, and no act in the name of such corporation and seeking to bind the corporation can be lawfully performed except by the Board of Trustees. The president and secretary have no original powers, nor governing powers, and they have no authority, excepting certain min-

isterial acts by which they exercise powers delegated to them by the Board of Trustees. Every officer of a private corporation is subject to the will of a majority of the trustees comprising the board. To constitute a mortgage a valid mortgage and binding upon a corporation and its stockholders, the making, execution and delivery thereof must emanate from and be directed by the Board of Trustees, evidenced by a proper record of such proceeding spread upon the minutes of the corporation. The power to perform the ministerial act of making, executing and delivering such mortgage may be delegated to an officer of the corporation, usually the president and secretary, but these officers can only exercise such authority as has been delegated to them by the Board of Trustees. Their powers are practically the same as an attorney-in-fact. Their acts are limtied to the authority conferred upon them by the Board of Trustees, hence a mortgage executed by the president and secretary of a corporation to be valid must be the act of the corporation itself and not of the president and secretary. The personality of the president and secretary are impotent, and their acts as individuals are of no effect. The substantial requisite is that to constitute a valid mortgage it must be the act of the corporation.

Some stress is laid upon certain decisions of the Supreme Court of Washington holding that if the persons performing the act in question, constitute the entire holding power of the corporation, then the formality of action by the governing body of the corporation may be dispensed with.

In this case, as will fully appear from the transcript from the superior court of the State of Washington in and for the County of Pacific, in an action brought by Effie McKenzie against J. Albert Heath (Record, page 69 *et seq.*) it appears from the findings of that state court that on May 1, 1908, eighteen months before the date of this mortgage, J. A. Heath sold absolutely an equal and undivided one-half interest in forty shares of the capital stock of the bankrupt corporation, delivery to be made as soon as the then certificates were released from the bank (Appellant) where the same were held as security for a loan to the bankrupt. This sale was absolute and Mrs. McKenzie became the legal owner of these shares of stock, although not accompanied by delivery, and as to the same J. A. Heath became trustee for Mrs. McKenzie. It is true that he reserved the right to vote this stock, but that did not effect her ownership or right to notice from the Board of Trustees as to the making of a contemplated mortgage jeopardizing her entire interest. While it is true that she could not vote, perhaps, it is equally true that the courts would have afforded her relief by injunction, in case the trustee were acting unlawfully or fraudulently.

The bankrupt corporation was located in the City of Raymond. The mortgage and the certificate of acknowledgment were executed at South Bend away from the office of the bankrupt, and possibly surreptitiously, in order that Mrs. McKenzie should be wholly unaware of the danger in which they were placing her interest. Suppose Heath did convert this stock. He was a

trustee, and if he could lawfully act on December 2, 1910, and make the mortgage in question he must have been a stockholder and possessed of stock in the bankrupt, and it is the universal rule, deduced from the decisions of the courts, that in legal effect instead of embezzlement and disposing of the stock of Mrs. McKenzie he would be held to have sold his own stock and Mrs. McKenzie's right of ownership was not impaired at the time of the execution of the mortgage beyond the difference in the amount of stock held and owned by Heath and the interest which she had.

SECOND.

That the purported mortgage is void because the notary public who took the acknowledgement does not certify that the persons who executed it were known to him to be the officers of the corporation. It is void because the certificate of acknowledgment does not show that the officer or officers who executed the instrument were sworn and on oath stated that they were authorized to execute the instrument, and that the seal affixed is the corporate seal of the corporation.

The statutes of the state so far as applicable are as follows:

(*Rem.* & *Bal. Code,* Sec. 8745.)

"All conveyances of real estate or of any interest therein, and all contracts creating or evidencing any encumbrance upon real estate, shall be by deed."

(*Rem.* & *Bal. Code,* Sec. 8746.)

"A deed shall be in writing, signed by the party bound thereby, and acknowledged by the party making

it, before some person authorized by the laws of this state to take the acknowledgment of deeds."

As to acknowledgments by a corporation, at the time of the execution of said pretended mortgage, the laws of the State of Washington provided and now provide as follows:

"Certificates of acknowledgment of an instrument acknowledged by a corporation substantially in the following form shall be sufficient:

STATE OF WASHINGTON, }
COUNTY OF PACIFIC. } ss.

"On this ..... day of ....., A. D. 19.., before me personally appeared ....., to me known to be the (president, vice-president, secretary, treasurer, or other authorized officer or agent, as the case may be) of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation."

"In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written."

....., (Signature and title of officer."

Rem. & Bal. Code of Washington, Sec. 8761½.

(L. '03, p. 245, Sec. 1.)

The above statute is repugnant to the general statutes relating to acknowledgment of instruments, and the same is exclusive and mandatory.

The certificate of acknowledgment to the instrument in issue, is as follows:

STATE OF WASHINGTON, }
COUNTY OF PACIFIC. } ss.

"Be it remembered that on this 2d day of December, 1910, before me, the undersigned, a notary public in and for the State of Washington, personally appeared the within named J. A. Heath and Miles H. Leach, each to me well known to be the identical persons above named and whose names are subscribed to the within and foregoing instrument, and said J. A. Heath, as president and the said Miles H. Leach, as secretary of said corporation, and the said J. A. Heath acknowledged to me then and there that he as president of said corporation had affixed said name together with his own name, freely and voluntarily as his free act and deed and the free act and deed of said corporation; and the said Miles H. Leach also then and there acknowledged to me that he as secretary of said corporation had signed the above instrument as secretary of said corporation by his free and voluntary act and deed and the free and voluntary act and deed of the said corporation." "Witness my hand and official seal.
(Notarial Seal.) H. W. B. HEWEN,

Notary Public for the State of Washington,

It will be observed that the statute positively declares that the certificate shall show that the officer or

officers, who execute the instrument, *was sworn and on oath stated that he was authorized to execute the instrument and that the seal affixed is the corporate seal of the corporation.*

It will also be observed that the statute requires the officer taking the acknowledgment to certify, that the *person executing the instrument is known to the notary public to be the identical officer of the corporation*, which the person so executing the instrument claims to be.

The certificate of acknowledgment to the instrument in question contains neither of the above essential facts.

The persons who executed it were not sworn, and neither of them, stated on oath that he was authorized to execute the instrument.

The notary public before whom the purported acknowledgment was taken, does not certify that either of said persons was an officer in any capacity of the corporation.

The acknowledgment does not substantially comply with the statute.

The instrument was and is void. It is not valid either as a real estate nor as a chattel mortgage. It creates no lien on the property of the bankrupt corporation.

The statutes of Washington, Section 8761½ of *Rem. & Bal. Code*, requires the officer or officers who assume to act for the corporation, to *state on oath that he was authorized to execute the instrument, and that*

the seal affixed is the corporate seal.

The statute also prescribes, *that the notary public must certify that the person assuming to act as a certain officer of the corporation, is known to the notary public to be such officer of the corporation.* The certificate must follow the statute which is mandatory.

Smith v. Guar. Dental Co., 114 N. Y. S. 867.

The acknowledgment to the instrument in question contains none of the material facts required by the statute.

The decisions of the courts are unanimous in holding such an instrument void.

2 *Thompson on Corporations* (2 ed.), Sec. 1884.

Forrester v. Reliable Transfer Co., 59 Wash. 86.

Anderson v. Frye & Bruhn, 69 Wash. 89.

Cannon v. Deming, 53 N. W. 863.

Erickson v. Conniff, 101 N. W. 1104.

Holt v. Metropolitan Trust Co., 78 N. W. 947.

Gage v. Wheeler, 21 N. E. 1075.

Abney v. Ohio Lumber Co., 32 Southeastern 256.

The case last cited is very similar to the case at bar, and because the officer who executed the instrument was not sworn as required by the statute, the instrument was adjudged to be void.

In 2 Thompson on Corporations (2 ed.), Section 1884, the author says:

"The statutes in many jurisdictions require a peculiar form of certificate in the case of the execution and acknowledgment of deeds by corporations; *and it must affirmatively appear from the certificate itself that the requirements of such statutes have been substantially complied with.*" "The statutes in many jurisdictions require not only an acknowledgment on the part of the corporation by the proper officer, *but also an oath or form as to the authority and identity of such officer.*" "More particularly such requiremnets are that the officer or agent of the corporation must be first sworn or affirmed by the magistrate taking the acknowledgment, *and he must under oath say*: (a) "that he is the officer or agent of the corporation described in the particular writing, giving the date or other sufficient description for the purpose of identification; (b) that he is duly authorized by the corporation to execute and acknowledge the deeds and writing of such corporation; (c) that the seal affixed to said writing is the corporate seal of the corporation; (d) that the deed or writing was signed and sealed by him on behalf of said corporation and by its authority duly given." "After such deposition is given, the officer or agent must acknowledge the deed or writing to be the act and deed of the corporation." "*All of these facts must appear in the certificate of the certifying officer, before the instrument can be legally admitted to record.*" "*Under these requirements a failure to show that the acknowledging*

party was duly sworn and that he deposed to the facts contained in the certificate, was held to be fatal."

In *John Forrester vs. Reliable Transfer Company,* 59 Wash., 86, the Supreme Court of the State of Washington said:

"We therefore think it is plain that our law requires acknowledgment of the execution of such instruments to be evidenced by certificate of the officer taking the same, and written upon or annexed to the instrument. It is also to be remembered that such instruments are not now as formerly required to be witnessed. *Code* of 1881, Sec. 2311, 2312; *Rem.* & *Bal. Code,* Secs. 8745, 8746. This fact would seem to enhance the importance of the certificate of acknowledgment, for it now remains as the only official authentication of the execution of the instrument required by our law." "In 1 *Cyc.* 616, the rule as to the admissibility of parol or other proof than the certificate, to prove acknowledgment of the execution of an instrument is stated as follows:

> 'It is the general rule that the official certificate is the only competent evidence of the fact of acknowledgment; and where such certificate is defective in a matter of substance, evidence aliunde is not admissible to show that the statute was in fact complied with, and that the officer, through mistake, failed to certify the acknowledgment correctly. If such evidence were allowed to supply a material part of the certificate, then logically it would be ad-

> missible to supply an entire certificate, and the acknowledgment might therefore rest in parol.'

"As we proceed let us remember that we are not here concerned with a certificate of acknowledgment which is merely defective in form and substance. We are dealing with a problem involving the entire absence of any certificate having any reference whatever to the execution of this lease by appellant, the lessor. It is a matter of proving the acknowledgment absolutely unaided by any certificate."

"In the case of *Hayden vs. Westcott*, 11 Conn. 129. the court said:

> 'The statute requires that all deeds of land shall be acknowledged; and the only question is, how the acknowledgment shall be evidenced; because it is obvious that if parol evidence may be introduced, to aid a defective certificate, on the same principle it may be introduced to supply one. The acknowledgment may rest in parol, and the certificate of the magistrate may be entirely dispensed with. The claim now made inevitably leads to this conclusion. It can only be necessary to observe that such a claim is opposed to the uniform course of practice, to the spirit and meaning of the statute, and to the authority of adjudged cases.'

In the comparatively recent case of *Solt vs. Anderson*, 71 Neb. 826, 99 N. W. 678, the court observed:

'Running through all the cases will be found a strong feeling against the admission of parol evidence to show the due execution of instruments affecting the title to real estate. The present case shows that such feeling is not unreasonable, and that sound considerations of public policy demand that, where an acknowledgment is necessary to give effect to an instrument, the evidence of the fact of such acknowledgment shall be preserved in a permanent form, and not left to the memory of living witnesses. In this instance, after the lapse of ten years, witnesses took the stand and testified to the exact legal phraseology used by the parties in acknowledging the deed; other witnesses were quite clear that no such language was used. Human memory should not be put to such a strain, nor land titles left to rest on so uncertain ground.'

"This was said in a case where there was no certificate, and the acknowledgment was attempted to be proved by parol."

It was by virtue of the above decision of the Supreme Court of the State of Washington, and the universal rule and decisions of other courts, that Judge Hanford, in deciding this case in the trial court, said:

"I find among the papers an affidavit by Mr. Leach, secretary of the bankrupt corporation, affirming the facts omitted in the cer-

tificate of acknowledgment of the mortgage and also stating that at the time of the execution of the mortgage, all of the stock of the corporation was owned by himself and the president of the corporation, who joined in execution of the mortgage and that himself and the president were the only trustees of the corporation at that time." "I deem it sufficient to say in regard to this affidavit that it cannot be regarded as a plea of estoppel nor as competent evidence, either to sustain such a plea or to cure the defective certificate of acknowledgment."

The principle that where the statute requires certain acts to be performed, that such acts are a part of the execution of the instrument and not merely to permit recording, has been again announced by the Supreme Court of Washington as late as June 18, 1912. In the case of *Anderson vs. Frye & Bruhn Inc.* 124 Pac. Rep. 499, the following very pointed language, in enunciating this principle, is used in the opinion of Judge Parker:

> "In compliance with these provisions, this court has declined to recognize the validity of leases and agreements for leases of real property for a period exceeding one year when they are not in writing, and when they are not acknowledged. *Richards v. Redelsheimer,* 36 Wash. 325, 78 Pac. 934; *Watkins v. Balch,* 41 Wash. 310, 83 Pac. 321, 3 L. R. A. (N.

S.) 852; *Dorman v. Plowman*, 41 Wash. 477, 83 Pac. 322; *Forrester v. Reliable Transfer Co.*, 59 Wash. 86, 109 Pac. 312, Ann. Cs. 1912, 1093. In the last cited case the importance of the acknowledgment, in view of the provisions of the statutes making it an act to be performed as a part of the execution of the instrument and affecting its validity rather than as a mere prerequisite to its recording, was pointed out. It is apparent, under these statutory provisions, that the acknowledgment of the instrument is as necessary to its validity as that it be in writing. 1 *Cyc.* 514. In *Richards v. Redelsheimer*, touching the question of the necessity of an agreement for a lease, as well as a formal lease, being in writing, the court said: "When we come to consider the history of the statute, and the abuses which it sought to correct, principal among them being the tendency to fraud and perjury, it is difficult to distinguish any substantial difference between an oral contract to execute a written lease of real estate and an oral lease of real estate. For instance, an oral lease, which was clearly within the statute, could be construed to be a contract for a lease, and thus take the case out of the statute, and accomplish indirectly what could not be done directly. *Brown*, Statute of Frauds 139, and cases therein cited," 20 *Cyc.* 229. This language would be equally

applicable to the necessity of an acknowledgment to the instrument, under our statutes above quoted, since, as we have seen, acknowledgment is as necessary as writing. If absence of writing renders the contract void, the absence of acknowledgment also renders it void."

And as Judge Hanford says, in one of his written opinions, in this case, (Record, page 100), the Circuit Court of Appeals for the Ninth Circuit, has repeatedly rendered decisions upholding the principle that statute prescribing the mode of executing instruments required to be recorded as evidence of rights to property in this state, are mandatory and such instruments lacking the prescribed solemnities are void.

Chilberg v. Smith, 174 Fed. 805.
Mills v. Smith, 177 Fed. 652.
In *re Osborn*, 194 Fed. 257.

Another case, exactly in point, from which no appeal was taken, is that of *First Nat. Bank v. Baker*, 62 Ill. App. 154, in which the Illinois Court held that the form of acknowledgment for corporations prescribed by statute was imperative.

In *Cannon v. Demig*, 53 N. W. 863 (S. D.) the Court says:

"Section 3288, Comp. Laws, relating to the certificate of acknowledgment and to recording transfers of real property, provides that 'such certificate of acknowledgment, unless it is otherwise in this article provided, must be substantially in

the following form: (Venue) On this ———— day of ————, in the year ————————, before me personally appeared ————————, known to me, or proved to me on the oath of ————————, to be the person who is described in and who executed the within instrument, and acknowledged to me that he (or they) executed the same."

"In the acknowledgment upon the deed of assignment the words 'known to me or proved to me on the oath of ————————, to be the person who is described in and who executed the within instrument,' are omitted."

"Was this omission a fatal defect? The acknowledgment of an instrument must not be taken unless the officer taking it knows or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument. Section 3281 Comp. Laws. There are at least four essential facts that must substantially appear in the certificate of acknowledgment, viz: (1) That the person making the acknowledgment personally appeared before the officer who makes the certificate; (2) that there was an acknowledgment; (3) that the person who makes the acknowledgment is identified as the one who executed the instrument; and (4) that such identity was either personally known or proved to the officer taking the ac-

knowledgment. The statute requires that the certificate shall at least set out substantially these essential facts."

"The authorities to this effect are numerous and quite uniform."

"The identity of the party making the acknowledgment is an essential feature, and must appear in the certificate. See authorities collated under title 'Acknowledgment,' 1 Amer. & Eng. Enc. Law, p. 154. An examination of the cases which hold that an omission of words of identity is not a fatal defect shows that there did not exist at the time a statute requiring such personal identification, or that the statute was substantially complied with. See same authorities cited in the above valuable work, at the same page. A majority of the statutes of the several states require the certificate to show that the party acknowledging the instrument was known to or proved to the officer to be the person who executed it."

"This is deemed to be a matter of substances, and an important safeguard against fraud."

In *Erickson vs. Conniff*, 101 N. W. 1104, 19 S. D. 41, the Court says:

"Rev. Civ. Code 1903, Sec. 974, provides that the acknowledgment of an instrument must not be taken, if executed by a corporation, unless the officer taking it knows or has satisfactory evidence that the person making the acknowledgment is the

president or secretary; and section 981 gives the form of a certificate of acknowledgment executed by a corporation, and provides that the officer must certify that the person acknowledging is known or proved to be the president or secretary. Section 636, Rev. Code Civ. Proc., 1903, provides that, to entitle one to foreclose a mortgage by advertisement, any assignment of the mortgage must have been duly recorded."

And the Court held,

"That where the certificate of acknowledgment of an assignment of a trust deed given by a corporation certified that the persons making the acknowledgment were personally known to the officer to be the vice president and assistant secretary of the corporation, the acknowledgment was insufficient to authorize recording of the assignment and a foreclosure of the trust deed by advertisement under section 636, was of no validity."

In *Holt vs. Metropolitan Trust Co.*, 78 N. W. 947 (S. D.), the Court says:

"This appeal involves the validity of a real estate mortgage foreclosure by advertisement. It seems to be conceded by counsel that the validity of the foreclosure proceeding depends upon the sufficiency of the certificate of acknowledgment of a certain assignment of the mortgage which was recorded in the proper county. Such assignment and certificate are as follows:

"'For value received, the Fidelity Loan and Trust Company of Sioux City, Iowa, does hereby transfer and set over unto the Metropolitan Trust Company of the City of New York, trustee, all its right, title, and interest, in and to a certain first mortgage, for $3,500, bearing date the 10th day of July, A. D. 1891, executed by Nellie Holt and husband upon 160 acres of land situated in Minnehaha county, South Dakota, and described as follows: (Here the land is described.) Said mortgage having been duly recorded in Book 42 of Mortgages, on page 159, of Minnehaha County, South Dakota records, on the 15th day of July, A. D. 1891. In witness whereof, the Fidelity Loan and Trust Company has caused these presents to be signed and delivered by its president and secretary this 27th day of August, 1891, with the seal of the company affixed. Joseph Sampson, President. John C. French, Secretary. (Seal of Fidelity Loan & Trust Co., Sioux City, Iowa).

"Witnesses: J. L. Ruine, E. C. Currier.

"State of Iowa, Woodbury County—ss.: On this 27th day of August, A. D. 1891, before the undersigned, a notary public in and for said county, personally came Joseph Sampeson and John C. French to me personally known to be the identical persons whose names are subscribed to the foregoing instrument as president and secretary of the Fidelity Loan & Trust Company, the grantor therein named, and acknowledged said instrument to be the act and deed of said company, by them.

as officers of said company, voluntarily done and executed. Witness my hand and official seal the day and year last above written. F. J. Tripp, Notary Public. (Notarial Seal.)"

The objection to the certificate of acknowledgment is that the officer making it does not certify that the persons who acknowledged the execution of the assignment were known to him to be the president and secretary of the corporation.

The statutes of this state (Comp. Laws) contain the following provisions:

"Sec. 3281. The acknowledgment of an instrument must not be taken, unless the officer taking it knows, or has satisfactory evidence, on the oath of affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president or secretary of such corporation."

"Sec. 3288. An officer taking the acknowledgment of an instrument must indorse thereon or attach thereto a certificate substantially in the forms hereinafter prescribed. * * * (2) The certificate of acknowledgment of an instrument executed by a corporation must be substantially in the following form: 'State of ————, County of ————, ss.: On this —— day of ———— in the year ———, before me (here insert the and quality of the officer), personally appeared

———, known to me (or proved to me on the oath of ————) to be the president (or secretary) of the corporation that is described in and that executed the within instrument, and acknowledged to me that such corporation executed the same.' "

"It is clear that a certificate of acknowledgment must substantially conform to the requirements of the statute."

Such is the language of the statute, and the holding of this court. *Cannon vs. Deming*, 3 S. D. 421, 53 N. W. 863. The form prescribed for instruments executed by corporations requires a certificate that the person who makes the acknowledgment is known or proved to be the president or secretary of the corporation; and the preceding section of the statute positively prohibits an officer from taking the acknowledgment of an instrument, if executed by a corporation, unless he knows or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making the acknowledgment is the president or secretary of such corporation. The essential fact to be known by or proved to the certifying officer is that the person appearing before him is the president or secretary of the corporation. If he does not know this fact, the only evidence he can receive is the oath or affirmation of a credible witness. Therefore, he cannot act upon any presumption arising from the recitals or seal of the instrument itself.

"*In this case the officer certifies that Sampson*

and French are known to be the identical persons whose names are subscribed to the instrument as president and secretary of the corporation." "This is far short of a certificate that they are known to be the president and secretary of the corporation." "He might have made this certificate truthfully, well knowing that they were not in fact officers of the corporation. The evident intent of the law is to prevent persons from representing themselves to be officers of corporations when they are not. The certificate does not substantially comply with the statute, the assignment was not so acknowledged and certified as to entitle it to be recorded, and the order of the circuit court overruling defendant's demurrer to the complaint is affirmed."

In *Gage vs. Wheeler,* 21 N. E. 1075 (Ill.) the Supreme Court says:

"But acknowledgments to conveyances to real estate can only be made when the grantor is personally known to the officer taking such acknowledgment to be the real person who and in whose name such acknowledgment is proposed to be made, or shall be proved to be such by a credible witness; and the fact of such personal knowledge or proof must be stated by such officer in the certificate of acknowledgment (Section 24, c. 30 Id.) the form of which certificate is given in Section 26 of the same chapter."

"Here the certificate failing to show that the grantors were personally known to the officers, or

that they were proved to him by a credible witness are fatally defective. Tully vs. Davis, 30 Ill. 103; Fell vs. Young, 63 Ill. 106; Shephard vs. Carriel 19, Ill. 313. The instruments are, therefore, of no greater force if no attempt had been made to acknowledge them."

In *Bennett vs. Knowles,* 68 N. W. 111 (Minn.) the Supreme Court says:

"Where the deed or other instrument is executed by or on behalf of an individual, there is but little difficulty in establishing before the officer the identity of the party described therein, and who executed it, for, as a rule, such fact is personally known to such officer, but where the deed is executed by a corporation the difficulty is greatly increased. The acknowledgment for the corporation can only be made by some officer or representative who has authority to execute such instrument in its behalf,—in fact not generally within the personal knowledge of the officer taking the acknowledgment. It is nevertheless essential to the validity of such acknowledgment that it appear prima facie from the officer's certificate, when read in connection with the deed, that the person making the admission or acknowledgment as to the execution thereof was authorized to execute it for the corporation. If the certificate fails in this particular, the proof of the execution fails, precisely as it would in the case of the deed of an individual if the officer failed to certify as to the identity of the party acknowledging it." "If the acknowledg-

ment here in question had followed the statutory form, there could be no question as to its sufficiency. It would then have appeared on the face of the officer's certificate, prima facie, that the person making the acknowledgment was authorized to execute the instrument for the corporation. Gen. St. 1894, Sec. 5650. This statute, while it is not mandatory, and need not be strictly followed, yet it prescribed a certain and practicable method of making proof of the execution of a deed by a corporation before the proper officer, and certifying the same on the instrument so that such certificate or acknowledgment will prima facie prove the execution of the deed." "If any other form is adopted, the certificate must state all that is necessary to show a valid acknowledgment. No material fact can be omitted.

* * * * * * * *

"The parties to the deed are designated therein as the New Columbia Athletic Club, party of the first part, and the plaintiff as the party of the second part. The conclusion and signatures are as follows: 'In testimony whereof, said party of the first part has hereunto set their hand and seal the day and year above written. The New Columbia Athletic Club. (Seal) W. A. Dunlap, President. (Seal).' Then follows the certificate of acknowledgment, which, omitting the venue, and official signature and seal, is in these words:

"On the 15th day of July, A. D. 1895, before

me, a notary public within and for said county, personally appeared W. A. Dunlap, who acknowledged that he is president of the within corporation, and that he signed the foregoing deed as its president and that he has been duly authorized to sign the same by the board of directors of said corporation, to me known to be the person described in, and who executed, the foregoing instrument, and acknowledged that he executed the same as his free act and deed." *"It is to be observed that the officer taking the acknowledgment certifies that W. A. Dunlap appeared and acknowledged that he is president of the corporation, and signed the deed as such, and that he was authorized by the directors to sign the same; that is, he admits or acknowledges these facts before the officer, but he does not prove them by his oath, as the statute requires. Neither does the officer certify that Dunlap is known to him to be such president, and authorized to execute the deed for the corporation."*

We call the Court's attention to the fact that the last case above quoted from and the one at bar are very similar; very much alike in that the statute is almost identical with the statute of Washington, and that the certificate of acknowledgment is like the one in question. The court is positive that the instrument is void, because of the lack of authority to execute it, for in that case, as here, the officer does not on his oath state that he had authority to execute the in-

strument; and the officer who took the acknowledgment there, as here, does not certify that the officer executing the instrument was personally known to be that identical officer.

THIRD A.

Because that even if the mortgage could be held valid as a real estate mortgage, it is void as a chattel mortgage, because it was not recorded as a chattel mortgage in the office of the auditor of Pacific County, Washington.

(See stipulation on page 88 of Transcript on the point that the instrument was never recorded as a chattel mortgage.)

Section 3668 of Rem. & Bal. Code of Washington, which is Section 4559 of Ballinger's Code, provides as follows:

> "A mortgage of personal property must be recorded in the office of the county auditor of the county in which the mortgaged property is situated, in a book kept exclusively for that purpose."

That section of the code was passed by the legislature of said state in 1879, and the same has ever since that time been in force and effect.

The laws of 1889, requiring a chattel mortgage to be only filed in the county auditor's office, relates only to mortgages for $300.00 or less, but all mortgages in excess of $300.00 *must be recorded*, and if not re-

In our opinion these cases have never been overruled and the construction placed on the statute by the above decisions is still the law of this state.

Urquhart vs. Cross, 60 Wash. 249, cited by appellant was a case where the court held that the transfer of the possession and title of mortgaged chattels to a bona fide mortgage, in satisfaction of the debt, is valid against an attachment by a subsequent creditor without regard to the validity of the mortgage.

It was a case where the mortgagor had transferred the title and possession of the property described in the void mortgage, prior to the time that the creditor attached, so that when he attached the property, neither the title nor possession of the property was in the mortgagor.

Great stress is placed by the appellant's brief upon several cases decided by the Supreme Court of Washington in which defective acknowledgments were sustained as being in substantial compliance with the statute. A careful reading of these cases will show that there had been under the alleged defective instrument, either a change of possession or an intervention by vested rights. One of the most important features of this case, to be constantly borne in mind, is that the appellant bank at no time had either real or constructive possession of the property described in the mortgage, but that immediately upon the adjudication of bankruptcy the trustee took, ever since and now has full, actual and manual possession of all of the property of the bankrupt described in the mortgage. (Record, page 89.)

We therefore earnestly maintain that the law as enunciated in the decisions in 16 Wash. 499, and in 12 Wash. 190, 40 Pac. 729, is the law of the State of Washington, for in those cases the point discussed here was there in issue and decided.

The law of these cases is based on the better reason, because, otherwise a secret lien may exist on property, and persons dealing with the owner and becoming his creditors, on the strength of his ownership, would be defrauded, if the statute only related to and protected only creditors who were such when the instrument was executed.

This mortgage not having been recorded as a chattel mortgage, was and is void as to the creditors who become such after the execution of the mortgage, because they not knowing of the existence of the mortgage parted with their money and gave it to the bankrupt corporation, on the strength of, and believing its property to be unincumbered.

In *Dunsmuir vs. Port Angeles Gas Etc. Co.*, 24 Wash., 104, the Supreme Court of the State of Washington says:

> "Our statute provides that a mortgage of personal property is void as against creditors of the mortgagors or subsequent purchasers and incumbrances of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith and without any design to hinder, delay or defraud creditors, and is acknowledged and recorded in the

corded it does not impart notice to creditors.

In *Merritt vs. Russell & Co.*, 44 Wash. 143, 87 Pac. 70, the Supreme Court of Washington said:

> "Whether or not this is true must depend upon the question as to whether or not said Section 4559 of Bal. Code being section 3668 of Rem. & Bal. Code is repealed by the act of 1899. The latter act not purporting to cover the entire subject matter of the former statute, and having no repealing clause, and repeals by implication not being favored, it follows that the provision in Section 4559 for the recording of the mortgage in the county to which the property has been removed is still in force, unless there is something in the act of 1899 repugnant thereto. We find in the latter act no such inconsistent provision.
>
> "Therefore, the appellant not having within thirty days after the removal of the property from Whitman to Spokane County caused the mortgage to be recorded in the latter county, and not having within said period taken possession of the same, its lien thereupon, as against these respondents who purchased the property in good faith and without knowledge of the mortgage, became ineffectual."

By referring to the Session Laws of 1899 of Washington, Section 6, being Section 3665 of Rem. & Bal. Code, it will be observed that the act of 1899 only refers to chattel mortgages for $300.00 and less. See also the notes to Sec. 3659 of the latter code by the compiler.

See also *Fenby vs. Hunt,* 53 Wash. 127, 101 Pac. 492.

Chattel mortgages for more than $300.00 must under said Section 3668 of Rem. & Bal. Code, be recorded in a book kept exclusively for that purpose in the office of the auditor of the County where the personal property is situated, and recording in the real estate mortgage records is not constructive notice.

Dunsmuir vs. Port Angeles Gas Company, 24 Wash. 104.

Manhattan Trust Company vs. Seattle Coal Company, 16 Wash. 499.

Radebough vs. Tacoma & etc. Ry. Company, 8 Wash. 570.

Subsequent to the decision of *Roy vs. Scott,* 11 Wash. 399, relied upon by appellant, as sustaining the doctrine that the statute did not make the instrument void where it was not recorded, as to persons, who became creditors subsequent to the execution of the mortgage, the Supreme Court of the State of Washington, in several cases decided positively and unequivocally that the *Statute did cover and does make void an unrecorded chattel mortgage as to persons who became creditors subsequent to the execution of the mortgage.* These later cases referred to are:

Manhattan Trust Co. vs. Seattle Coal & Iron Co., 16 Wash. 499.

Willamette Casket Co. vs. Cross Undertaking Co., 12 Wash. 190, 40 Pac. 729.

same manner as is required by law in conveyance of real property. 1 Hill's Code, Sec. 1648; Bal. Code, Sec. 4558. And it is further provided that such mortgage must be recorded in the office of the county auditor of the county in which the property is situated, in a book kept exclusively for that purpose. 1 Hill's Code, Sec. 1649; Bal. Code, Sec. 4559. The respondent's mortgage, it is conceded, was recorded in the records of real estate mortgages only, and if, as appellant contends, it is a mortgage of personal property, the record imparted no notice to appellant, and it will not be necessary to determine any question other than that presented by the third assignment of error."

Those who became creditors of the bankrupt, subsequent to the execution of the mortgage, may attack the mortgage, as the statute protects such creditors, against a mortgage such as the one in issue.

In *Willamette Casket Co. vs. Cross etc. Co.*, 12 Wash. 190, the Court said:

"That part of said section material to this question is as follows:

'A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchaser, and incumbrances of the property for value and in good faith, unless * * * it is * * * recorded in the same manner as is required by law in conveyance of real property.'

"And if the language used be given its ordinary significance, it would seem to fully warrant

such contention. It is claimed, however, by the respondent, that only such creditors are protected by the provisions of this section as before the time of the recordnig of the mortgage have obtained some specific lien upon the property." "But such construction would do violence to the language used. The statute makes no distinction as to the creditors who are to be protected, and we see no good reason for holding that one class rather than another was intended. One is as much a creditor before his claim has been make a specific lien upon certain property as after, and for that reason an unsecured creditor is as well described by the language of the section as one who had procured a specific lien as security for his claim." "The intention of the legislature was to protect those who should give credit upon the faith of property owned by one to whom it was extended, *and to give force to such intention the term 'creditors,' as used in the act, must be held to cover all classes of creditors.*"

"The cases cited by the appellant from this court, while not directly in point, are sufficiently so to justify their citation in support of the contention. The cases so cited are *Baxter vs. Smith*, 2 Wash. T. 97 (4 Pac. 35); *Darland vs. Levins*, 1 Wash. 582 (20 Pac. 309); *Hall vs. Matthews*, 3 Wash. 407 (36 Pac. 262); and *Radebaugh vs. Tacoma & Puyallup R. R. Co.*, 8 Wash. 570 (36 Pac. 460)." *"The language of the statute, and*

these authorities, satisfy us that it was the intention of the legislature to give no preference to a chattel mortgage over the claims of creditors who should become such after its execution, unless it was recorded within a reasonable time after its execution, that the mortgage in question was not recorded within such reasonable time."

"As to whether or not creditors whose claims existed at the time the mortgage was executed could take advantage of the failure to record, it is not necessary for us to decide, for the reason that, as we have seen, the court found that these creditors became such after the date of the mortgage. If the mortgage was thus inoperative as to creditors, we do not think it will be seriously contended that it would not be inoperative as to the receiver as their representative: for while it is true he also represents the corporation itself, yet his appointment prevented them from protecting themselves and must be held to have fully protected their rights."

In *Manhatten Trust Co. vs. Seattle Coal & Iron Co.*, 16 Wash. 499, the court says:

"A mortgage of personal property must be recorded in the office of the county auditor of the county, in which the mortgaged property is situated, in a book kept exclusively for that purpose."

"The plain, literal meaning of these sections is against the contention of plaintiff that it has

any lien whatever upon the personal property in the possession of the receiver as against these petitioners. There is no evidence whatever that the petitioners had any notice of the existence of any chattel mortgage in favor of the plaintiff. Counsel for plaintiff and receiver argued that, as petitioners, as creditors, have not negatived notice or knowledge on their part, it should be inferred against them; but this would be a novel rule and one that we have never seen applied. Such allegation and proof of notice should come from the one claiming the personal property under the alleged mortgage. But we are not prepared to decide that in any view there could be here a chattel mortgage as against these creditors."

"In *Willamette Casket Co. vs. Cross Undertaking Co.*, 12 Wash. 190 (40 Pac. 729) this court held a mortgage void as to subsequent creditors, which was not recorded in a reasonable time after its execution. The court said:

'The language of the statute, and these authorities, satisfy us that it was the intention of the legislature to give no preference to a chattel mortgage over the claims of creditors who should become such after its execution, unless it was recorded within a reasonable time after its execution.' *Baxter vs. Smith*, 2 Wash. T. 97 (4 Pac. 35); *Hinchman vs. Point Defiance Ry. Co.*, 14 Wash. 349 (44 Pac. 867); *Mendenhall vs. Kratz*, 14 Wash. 453 (44 Pac. 872); *Radebaugh vs. Tacoma, etc. R. R. Co.*, 8 Wash. 570 (36 Pac. 460)."

THIRD B.

It having been established by the facts and the authorities set out heretofore in this brief that the mortgage is void, because it was not acknowledged as required by the statute, and because it was never recorded as a chattel mortgage, we now contend:

That general creditors of the bankrupt who became such since the execution of the mortgage, could have attacked the mortgage, if the corporation had not been adjudged a bankrupt, and that now the trustee in bankruptcy being in possession of the property, may on behalf of such creditors attack the validity of the mortgage.

Manhattan Trust Co. vs. Seattle Coal & Iron Co., 16 Wash. 499.

Willamette Casket Co. vs. Cross Undertaking Co., 12 Wash. 190.

I Loveland on Bankruptcy (4th Ed.) Sec. 372 also Sec. 371.

Knapp vs. Milwaukee Trust Co., 216 U. S. 545-54 Law Ed. 610.

In Re Brazlmore, 189 Federal Rep. 236.

In re Pekin Plow Co., 112 Fed. 308.

In re Beede, 126 Fed. 853.

The rule contended for by appellant on pages 15 and 16 of its brief, is not the law, especially under the amendment of the bankruptcy act of June 25, 1910. The object of the amendment was to protect general creditors of the bankrupt as well as those having liens by judgment or attachment against the property of

the bankrupt.

The amendment provides that "such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

Section 8 of the Act of June 25, 1910, amending Sec. 47a of the Act of 1898.

I Loveland on Bankruptcy (4th Ed.) Sec. 372, page 768, it is said:

> "It will be observed that it is section 47a, relating to the collection of assets, and not section 70a, vesting title in the trustee that is amended. For the purpose of reclaiming property for the estate the trustee is given the rights, remedies and powers of a lien creditor with respect to property in custodia legis; and those of a judgment creditor holding an execution duly returned unsatisfied with respect to property not in custodia legis, in lieu of the rights of a general creditor to which he was limited prior to this amendment."
>
> "The trustee may be said to now stand in the shoes of the bankrupt, clothed with the rights, remedies and powers of a lien creditor and a judgment creditor instead of a general creditor as

before the amendment. He may now challenge any security or conveyance that a lien creditor or a judgment creditor might challenge had bankruptcy not intervened. But a lien which is valid under the state law as against the claims of such creditor is valid under the bankrupt law as against a trustee since the amendment as well as before it."

In Re Brazemore, 189 Fed. Rep. 236, it is said:

"The class of cases, unprovided for, by the original act, and intended to be reached by the amendment, were those in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the protential rights of creditors of that class. The language is readily susceptible of this construction." "It recites that such trustee shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon. This language aptly refers to such rights, remedies, and powers as a creditor holding such a lien is entitled to under the law, rather than to the rights, remedies and powers of a creditor who had actually fastened a lien on the property of the bankrupt estate."

In 1 Loveland on Bankruptcy, Section 371 the author says:

"The trustee is vested 'by operation of law with the title of the bankrupt, as of the date he was adjudged bankrupt, except in so far as it is to property which is exempt.'

"The trustee takes the title that the bankrupt had at the date of adjudication, and also the title that the bankrupt had to property fraudulently conveyed or encumbered at the time of the fraudulent transaction."

"It may be said generally that the trustee stands in the shoes of the bankrupt, and the property in his hands, unless otherwise provided in the bankrupt act, is subject to all of the equities impressed upon it in the hands of the bankrupt. He takes the property of the bankrupt, not as an innocent purchaser, but as the debtor had it at the time of the petition subject to all valid claims, liens and equities. Bankruptcy does not suspend the jurisdiction of equity to correct errors in written contracts caused by mutual mistake. What are valid claims, liens and equities is considered at length in another place."

"'This general rule prevailed under the former act. It has been the rule under the present act and is not changed by the amendment of 1910, *which gives the trustee additional 'rights, remedies and powers' to avoid liens, transfers and conveyances, as will be presently pointed out.*"

"Special provisions of the act place the title to certain property, encumbered with liens or transferred by the bankrupt, in the trustee and give him the power to avoid the same. Such transfers and encumbrances may be good as against the bankrupt. In some cases the creditors might

have set them aside, and in other cases they could not do so, had bankruptcy not intervened." *"The trustee may be said to stand in the bankrupt's shoes with additional powers conferred by special provisions of the act.*

"By these special provisions the trustee in bankruptcy is vested by the operation of law with the title the bankrupt had to all property transferred by him in fraud of creditors, or as a preference, or where the transfer or incumbrance is void as to creditors by the laws of the state, territory or district in which the property is situated. Property subject to liens created through legal proceedings within four months prior to the filing of the petition, passes to the trustee as a part of the state free of the lien, unless the court subrogates him to the right of the creditor holding the lien."

"These provisions confer on the trustee the title to the property mentioned and give him power to avoid the conveyance or encumbrance and reclaim the property for the estate. To this end he is vested with all the rights, remedies and powers of a lien creditor with respect to property in custodia legis, and with those of a judgment creditor holding an execution duly returned unsatisfied with respect to property not in custodia legis."

In First Loveland on Bankruptcy (4th Ed.), Section 434 it is said:

"The validity and extent of a lien on the prop-

erty of a bankrupt is determined by the local law as construed by the highest courts of the state. * * * The validity and extent of a lien created by a transfer of property by way of mortgage, deed, bill of sale, conditional sale, pledge, or otherwise presents a question of local law."

It will be observed from the authorities heretofore cited in this brief that this mortgage was not acknowledged as required by the laws of the State of Washington, and consequently it is invalid as a real estate mortgage, and it was not recorded as a chattel mortgage and consequently it is invalid as a chattel mortgage. It will also be observed that by the decisions of the supreme court of the State of Washington, creditors who become such, subsequent to the execution of the mortgage may attack the validity of the mortgage. See the cases heretofore cited, namely:

Manhatten Trust Co. vs. Seattle Coal Co., 16 Wash. 499.

Willamette Casket Co. vs. Cross Undertaking Co., 12 Wash. 190, 40 Pac. 729.

In *Knapp vs. Milwaukee Trust Co.*, 216 U. S. 545-54, Law Ed. 610 particularly page 615, the court says:

"But it is said the trustee in bankruptcy may not defend against these mortgages. It is contended that they are good as between the parties, and that, as to them, the trustee in bankruptcy occupies no better position than the bankrupt.

This question was raised and decided in *Security Warehousing Co. vs. Hand*, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 A. & E. Ann. Cas. 789. That case arose in Wisconsin, and it was therein held that under the law, an attempted pledge of property, without change of possession, was void under the laws of that state. In that case, as in this one, the question was raised as to whether the trustee in bankruptcy could question the transaction, and it was contended that, being valid as between the parties, the trustee took only the right and title of the bankrupt. The question was fully considered therein, and the previous cases in this court were reviewed. The principle was recognized and that the trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands is subject to the equities impressed upon it while in the hands of the bankrupt."

"But it was held that the attempt to create a lien upon the property of the bankrupt was void as to general creditors under the laws of Wisconsin. Applying Sec. 70a of the bankruptcy act, it was held that the trustee in bankruptcy was vested by operation of the bankrupt law with the title of the property transferred by the bankrupt in fraud of creditors, and also that the trustee took the property which, prior to the filing of the petition, might have been levied upon and sold by judicial process against the bankrupt. It was therefore

held that, as there had been no valid pledge of the property, for want of change of possession, it could have been levied upon and sold under judicial process against the bankrupt at the time of the adjudication in bankruptcy, and passed to the trustee in bankruptcy."

"The principles announced in *Security Warehousing Co. vs. Hand, supra,* when applied to the present case, are decisive of the question here presented. Under the Wisconsin statutes and decisions of the highest court of that state the conditions contained upon the face of this mortgage were such as to render it fraudulent in law and void as to creditors, and prior to the filing of the petition in bankruptcy the property might have been levied upon and sold by judicial process against the bankrupt."

"The suggestion in appellant's brief, that the trustee in bankruptcy may possibly recover against directors and officers of the corporation for dereliction of duty, and against stockholders for unpaid subscriptions an additional liability on their part, presents no reason why he may not resist an attempt to take all the available property in his hands to apply on a mortgage void as to creditors at the time of the adjudication."

"We are of opinion, for the reasons stated, that the mortgages in question are void, and that, under the bankruptcy law, the trustee can assert their invalidity."

In *Mitchell vs. Mitchell*, 147 Fed. 281, which was a case where creditors who became such subsequent to the execution of a chattel mortgage, the court said:

> "The bankrupt law instead of vesting in the trustee the remedies of the creditors against the property judgment, execution, and creditor's bills, vests in him at once the title to the property—makes him the owner."
>
> "It is argued that the mortgage in controversy being good as between the parties is also good as between the mortgagees and trustee in bankruptcy of the mortgagor; but the rule is well settled that the trustee represents the rights of creditors, and may attack conveyances made by the bankrupt in fraud of creditors." "It is so provided in the statute. The trustee may prosecute any suit to recover assets in the hands of third parties, or to enforce the payment of claims that could have been prosecuted by the creditors themselves had no proceedings in bankruptcy been instituted."

THIRD.

It is argued in appellant's brief that justice requires the sustaining of the mortgage, but in this respect we differ from the appellant and insist that the equities are not with the appellant.

Referring to the affidavit of Samuel McMurran, found on page 57 of the transcript, and the affidavit of Miles H. Leach, found on page 59 of the transcript,

it is but fair to assume that this mortgage was given by the bankrupt corporation to the appellant to secure a pre-existing debt which the bankrupt owed appellant, consequently appellant does not come within the definition of an incumbrancer for value and in good faith as that term is defined by the laws of the State of Washington.

Hicks vs. National Surety Co., 30 Wash. 16.

In the above case the court said:

> "That this statute makes a broad distinction between creditors and subsequent purchasers or incumbrancers. As to the former it positively declares that chattel mortgages are void unless they are accompanied by the specified affidavit and are acknowledged and recorded as required by law. But an incumbrancer or subsequent purchaser, in order to avail himself of an omission of the affidavit, or of a failure to acknowledge or record the instrument, must be able to show that he is an incumbrancer for value and in good faith."

Mendenhall vs. Kratz, supra.

"The instrument under which appellant claims was taken as security for a pre-existing debt or a pre-existing contingent liability. Under such circumstances does it come within the definition of an incumbrancer for value and in good faith, as that term is defined in law? Under the great weight of authority it does not."

Finally, upon the law of the entire case and all questions arising here, we confidently cite the two

written opinions of Judge Hanford, an eminent authority, who adorned the Federal bench for more than two decades. (Record, pages 92-101.)

We submit that the judgment of the district court should be affirmed and the appellees should recover their costs and disbursements herein.

Respectfully submitted,

CHARLES E. MILLER,

Attorney for A. S. Coates, as Trustee of Raymond Box Company, bankrupt, appellee.

Address, South Bend, Washington.

JOHN T. WELSH,

MARTIN C. WELSH,

Attorneys for Answering Creditors, Appellees.

Address, South Bend, Washington.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE PACIFIC STATE BANK, a corporation, *Appellant*, vs. A. S. COATES, as Trustee in Bankruptcy of Raymond Box Company, a corporation, bankrupt, *Appellee.*	No. 2193

APPEAL FROM THE DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

REPLY BRIEF OF APPELLANT

In the statement of the case by appellees, it is said that the promissory note and mortgage were given for a pre-existing indebtedness. (Paragraph 4, page 4.) This statement is not correct, as ap-

pears by the record, as will be hereafter shown. The statements contained in Paragraph 13, on page 7, of appellees' brief, are not, as we contend, true. The facts in this regard are to be ascertained from the affidavit of Mr. Leach (page 68, Transcript) and the findings and judgment of the Superior Court of the County of Pacific in the case of *McKenzie, Administrator, vs. J. Albert Heath.* (Trans., page 69, and Stipulation of Facts, page 86.)

ARGUMENT.

Under the second head of their brief, appellees contend that the purported mortgage is void because the notary who took the acknowledgment does not certify that the persons who executed it were known to him to be the officers of the corporation, and because the certificate does not show that the officers who executed the instrument were sworn. In discussing this question the appellees contend that the statute authorizing a form therein set out as a form for corporate acknowledgment is repugnant to the general statute relating to acknowledgment of instruments, and is exclusive and mandatory, but they cite no authorities in support of their position.

As we pointed out in our opening brief, the Supreme Court, in the case of *Kley v. Geiger*, 4 Wash. 484, has held that a form provided by the

Statutes of Washington for individual acknowledgments, and stated by the statute to be sufficient, is not an exclusive form. The language of Section 8761½, Remington & Ballinger's Code, containing a form for corporate acknowledgment, does not upon its face make that form exclusive, but says it shall be sufficient. The form considered in *Kley v. Geiger* did not comply with the form set out in Section 8761, Remington & Ballinger, which is stated therein to be sufficient. We believe it follows that the Supreme Court of this state would hold, and in effect have held, that the form set out in 8761½ is an optional form only. See also:

Bennett v. Knowles, 68 N. W. 111.

Boswell v. First Nat'l Bank, 92 Pac. 631.

Counsel has diligently collected the cases from different jurisdictions decided under varying statutes and varying circumstances and relations of the parties wherein the particular acknowledgments are held to be insufficient, and deduces therefrom that the courts are "unanimous" in holding such acknowledgments, and the instruments to which they are attached, void. Of course, this statement of counsel cannot be taken as correct, since, as stated in Cyc., Vol. 1, page 513, "except where the statute expressly makes acknowledgment essential to the validity of the instrument, it is universally held that an acknowledgment is no part of the contract between the parties, and the instru-

ment is valid without it," and since the Supreme Court of the State of Washington has in numerous cases held that deeds, mortgages, chattel mortgages and bills of sale are valid between the parties, whether acknowledged or not. See cases quoted on page 22 of our brief. See also:

Hicks v. National Surety Co., 50 Wash. 16.
Chase v. Tacoma Box Co., 11 Wash. 377.
Roy v. Scott Hartley & Co., 11 Wash. 399.
Mendenhall v. Kratz, 14 Wash. 453.

The cases cited from other states do not give much light on the case at bar because this is purely a question of Washington law under Washington statutes, but an examination of the decisions generally shows that the policy of the State of Washington to render valid and to give force and effect to all conveyances voluntarily and in good faith signed by the grantors, and not to render such deeds ineffectual in consequence of an informality or defect as to the proof of their execution (*Carson v. Thompson*, 10 Wash. 295) is generally followed by a large majority of the courts of last resort.

In Cyc., Volume 1, page 582, it is stated:

"It is a rule of universal application that a literal compliance with the statute is not to be required for a certificate of acknowledgment, and that if it substantially conforms to the statutory provisions as to the material facts to be embodied therein it is sufficient. * * * It is the policy of the law

to construe them liberally and not to allow a conveyance to be defeated by unsubstantial objections to the certificate of acknowledgment."

See also *Summer v. Mitchell*, 29 Florida 109, 10 So. 562, 14 L. R. A. 815, where it is stated that "all technical omissions will be disregarded," and that "it should be the aim of the courts to preserve and not to destroy."

Out of the multitude of cases which illustrate the liberality of courts in sustaining the instrument, disregarding formal facts, we refer to the following:

An acknowledgment reciting that the president and secretary acknowledged the instrument as their voluntary act and deed, is held sufficient.

Eppright v. Nickerson, 78 Missouri 482.

Tenny v. East Warren Lumber Co., 43 N. H. 343.

McDaniels v. Flower, 22 Vermont 274.

An acknowledgment on behalf of a bank by the president and cashier wherein they acknowledge that they executed the instrument for the purposes and considerations there contained, held sufficient to show that the instrument is the instrument of the corporation.

Muller v. Boom, 63 Texas 91.

Under a statute requiring the certificate to state substantially that the person making the acknowledgment is known to the officer, a certificate re-

citing "personally appeared J. T. Bates, tax collector of said county, to me well known and acknowledged," and signed J. T. Bates, Tax Collector, is held to be a substantial compliance with the statute.

Schleicher et al. v. Gatlin, Texas, 30 S. W. 120.

See also,

Zimpleman v. Stamps, 51 S. W. 341.

In the case of *Fitch v. Lewiston Steam Mill Co.*, 12 Atlantic 732, from the acknowledgment it appeared that "Jas. Wood, treasurer, personally appeared and acknowledged the above instrument to be his free act and deed." This was sustained as the acknowledgment of the corporation, and the case of *Tenny v. East Warren Lumber Co.* was cited approvingly.

As to the general policy of the courts in sustaining acknowledgments, see also *Boswell v. First National Bank*, 92 Pac. Opn. 631. In the last cited case it is held that a statement in the certificate that the subscriber personally appeared, necessarily implies that he was personally known.

That the instrument acknowledged may be resorted to for support to the acknowledgment, see *Summer v. Mitchell*, 29 Florida, *supra*, and Cyc., Volume 1, page 584, and *Lea v. Polk Co. etc.*, 75 U. S. 513. There is not any substantial conflict on this point.

Aside from the contention that the form given

in the statute is exclusive, the case of *Banner v. Rosser, Virginia*, 31 S. E. 67, Opn. 72, is in all essential respects on all fours with the instant case. It was there claimed that the acknowledgment was insufficient because the notary's certificate did not certify that the person acknowledging was the president of the corporation. The court said, however:

"The deed * * * was signed by the Minneapolis Improvement Co., by Thomas Rosser, president, with the corporate seal affixed and the certificate of the notary states that 'Thomas Rosser, president, whose name is signed to the writing hereto annexed, bearing date of the second day of December, 1891,' acknowledged the same before him in his county. It identifies the subscriber, specifies the writing subscribed, states the capacity in which he executed it and certifies his acknowledgment thereof. The foregoing contains all that is necessary. See *Bank v. Goddin*, 76 Virginia 506."

State v. Coughran, 19 S. D. 271.

Counsel for appellees rely upon two Washington cases holding that leases are invalid because they are not acknowledged.

Forrester v. Reliable Transfer Co., 59 Wash. 86.

Anderson v. Frye & Bruhn, 69 Wash. 89.

It will be conceded that the Supreme Court of this state have so held under the peculiar wording of the statute relating to leases, but this is not the statute under which the instrument in controversy is to be construed, either as a chattel mort-

gage or as a real estate mortgage, and, as we pointed out in our opening brief, the Supreme Court have uniformly sustained both real estate mortgages and chattel mortgages as between parties without any acknowledgment at all. See cases cited on page 52 of our brief, and see

Hicks v. National Surety Co., 50 Wash. Op. 18, and cases therein cited.

Counsel has not found any cases decided by our Supreme Court where instruments have been held void by reason of defective acknowledgments, though they have found two cases under a statute with relation to leases, holding them invalid even as between the parties, where they are wholly lacking in acknowledgment; but we believe it to be entirely established in this state that deeds and mortgages, whether real or chattel, are good, at least between the parties, without any acknowledgment, and further, that this state has gone as far as any state in sustaining defectively acknowledged instruments as against third parties.

We have fully discussed in our opening brief the policy of the statutes and decisions of this state in sustaining acknowledgments (p. 23 *et seq.*), and have quoted in full (p. 24) Section 8784, Remington & Ballinger's Code (taken from Act of 1881 relating to Deeds), providing that instruments purporting to convey or encumber real property which have been recorded in the proper auditor's office

shall "impart the same notice to third persons from the date of recording as if the instrument had been executed, acknowledged and recorded in accordance with the laws regulating the execution, acknowledgment and recording of such instrument then in force."

II.

Under the head of "THIRD A," counsel for appellees discuss the proposition that the mortgage, even if entered as a real estate mortgage, is void as a chattel mortgage because not recorded as a chattel mortgage in the office of the Auditor of Pacific County, Washington.

In the Session Laws of 1899, page 158, Section 2 of "an act relating to chattel mortgages and the filing thereof, and repealing all laws in conflict therewith," the Legislature, referring to chattel mortgages, uses the following:

"Sec. 2. Every such instrument within ten days from the time of the execution thereof shall be filed in the office of the county auditor of the county in which the mortgaged property is situated, and such auditor shall file all such instruments when presented for the purpose upon the payment of the proper fees therefor, indorse thereon the time of reception, the number thereof, and shall enter in a suitable book to be provided by him at the expense of his county, with an alphabetical index thereto, used exclusively for that purpose, ruled into separate columns with appropriate heads: 'The time of filing,' 'Name of Mortgagor,' 'Name of Mortgagee,'

'Date of Instrument,' 'Amount Secured,' 'When Due' and 'Date of Release.' An index to said book shall be kept in the manner required for indexing deeds to real estate, and the county auditor shall receive for the services required by this act the sum of fifteen cents for every instrument, and the moneys so collected shall be accounted for as other fees of his office. Such instrument shall remain on file for the inspection of the public."

Sections 3 and 6 of the same Act are as follows:

"Sec. 3. Every mortgage filed and indexed in pursuance of this act shall be held and considered to be full and sufficient notice to all the world of the existence and conditions thereof, but shall cease to be notice, as against creditors of the mortgagors and subsequent purchasers and mortgagees in good faith, after the expiration of the time such mortgage becomes due, unless before the expiration of two years after the time such mortgage becomes due the mortgagee, his agent or attorney shall make and file as aforesaid an affidavit setting forth the amount due upon the mortgage, which affidavit shall be annexed to the instrument to which it relates and the auditor shall endorse on said affidavit the time it was filed."

"Sec. 6. That a mortgage given to secure the sum of $300 or more, exclusive of interest, costs and attorneys or counsel fees, may be recorded and indexed with like force and effect as if this act had not been passed, but such mortgage or a copy thereof must also be filed and indexed as required by this act."

The Supreme Court of the State of Washington in the case of *Averill v. Allbritton*, 51 Wash. 30, in construing a chattel mortgage securing a note

for $800, held that the copying of the mortgage upon the records as in the case of a real estate mortgage is not required, but that placing it on file and indexing it in the Auditor's office was sufficient. See opinion, page 32. In the case of *Mills v. Smith*, 177 Fed. 652, this court, referring to the Act of 1899 just above referred to, says:

"The Act of 1899 provides for the filing of chattel mortgages within ten days from the execution thereof and the indexing of the same, and declares that such filing and indexing shall be considered sufficient notice to the world. * * * Its purpose was to dispense with the necessity of recording chattel mortgages and to substitute a different registration therefor, leaving it optional with the mortgagee to record mortgages of $300.00 and more in accordance with the prior act, in addition to filing them in accordance with the law."

It is obvious that Section 6 quoted above merely preserves the right formerly enjoyed by mortgagees of recording their mortgages if over the sum of $300, but does not make it mandatory. The mandatory thing required by the Legislature was the filing and indexing, and not the recording.

The case of *Merritt v. Russell*, 44 Wash. 143, cited by respondents, only holds that when property is moved to another county the appellant must, under the old act, cause his mortgage to be entered in the latter county, which had not been done in the case there under consideration.

The cases found on page 36 of appellees' brief, in 24, 16 and 8 Washington, were decided prior to the passage of the Act of 1899 and are not authority as to its construction.

The case of *Fenby v. Hunt*, 53 Wash. 127, holds that it is not necessary to record a chattel mortgage where the debt secured is less than $300, a proposition to which we take no exception.

THE RIGHTS OF SUBSEQUENT CREDITORS.

Incorporated under this same head, counsel attempt to meet the proposition discussed in our brief, pages 15 *et seq.*, under the head, "Alleged Defective Acknowledgment," wherein we sought to demonstrate that under the law as established by our Supreme Court the trustee in bankruptcy who represented only creditors who became such subsequent to the date of the mortgage could not object to its validity either as a real or a chattel mortgage on the ground of any alleged defect in the acknowledgment. In our brief we cited *Roy v. Scott*, 11 Wash. 399, and *Urquhart v. Cross*, 60 Wash. 249. Appellees cite *Willamette Casket Co. v. Cross etc.*, 12 Wash. 190, and *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 16 Wash. 499.

It must be conceded that it is hard to reconcile these cases. In the case of *Roy v. Scott*, the Supreme Court had before it a question in all essential respects identical with the question now before the

court. Roy & Co. sought to foreclose a mortgage on the property of Scott Hartley & Co. McNaught was a subsequent purchaser who had recovered a judgment. The position of McNaught is similar to the position of the trustee who represents the general creditors, who, under the bankruptcy law, may be considered to have reduced their claims to judgment.

The Supreme Court first holds that since the president and secretary are the only stockholders of the corporation, and are the persons who executed the instrument, the mortgage is good as against the corporation. (Opn. 403.) The court then expressed its views as follows:

"Appellant McNaught, not only had no interest in or lien upon the property at the time that the mortgage and bill of sale in question were given, but the court has found that he was not at that time a creditor, and that there was no actual fraud in the transaction itself. Hence he clearly is not in a position to void the transaction. * * * The statute makes the chattel mortgage (unaccompanied by the affidavit) void only as against creditors of the mortgagor or subsequent purchasers and encumbrancers of the property for value and in good faith. The word 'subsequent' relates, not to creditors, but to purchasers and encumbrancers. Between the mortgagor and mortgagee the instrument was valid and binding as a mortgage without the affidavit, and McNaught, being at this time a mere stranger to the property and having no interest in it, cannot invoke the aid of the statute, which favors a class to which he does not belong."

The next case in point of time in which the Supreme Court considered the statute requiring the acknowledgment and recording of a chattel mortgage is in the case of *Willamette Casket Co. v. Cross*, 12 Wash. 190. The mortgage there in question was executed and delivered on the 22nd day of December, 1893, and not recorded until the fourth day of May, 1894. Between those dates the mortgagor had become indebted to creditors represented by the receiver, who on their behalf resisted the foreclosure of the mortgage. No reference is made to the prior case of *Roy v. Scott*, and if the Supreme Court intended to overrule the then existing doctrine they failed to make it clear.

The specific contention of the mortgagee seems to have been that only creditors who had a specific lien could resist the foreclosure. The Supreme Court overruled that contention, and in doing so used the language quoted in the appellees' brief. It is to be noted that this case was decided on a state of facts where the creditors had advanced moneys on the faith of unencumbered ownership of property in the mortgagor, there having been a total failure to record until after the moneys were advanced. On equitable principles constructive fraud might have been deduced from this fact, and the decision of the Supreme Court sustained on that ground alone. The language of the Supreme Court summarizing its decision was as follows:

"The language of the statute and these authorities satisfy us that it was the intention of the Legislature to give no preference to a chattel mortgagee over the claims of creditors who should become such after its execution, *unless it was recorded within a reasonable time after its execution.*"

The next case considered by the Supreme Court is *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 16 Wash. 499. This case involves priority of rights between a real and chattel mortgage not recorded as a chattel mortgage and without any affidavit of good faith, and issued to and held by the stockholders of the corporation on the one side, and creditors whose position as prior or subsequent creditors we are unable to ascertain from the opinion. The court holds that the burden of showing knowledge of the unrecorded mortgage upon the creditors is on the mortgagee. We do not believe the case is entitled to serious consideration in determining the question now before the Court.

The last case passed upon by our Supreme Court is *Urquhart v. Cross*, 60 Wash. 249. This is the last expression of the Supreme Court on the question and it quotes approvingly, and follows *Roy v. Scott*, 11 Wash. 399. The mortgage therein issued was not acknowledged and had no affidavit of good faith. After the date of the mortgage, the mortgagor incurred certain unsecured obligations on which suit was brought and writs of attachment issued and levied on the property in controversy. Prior to the levy the mortgagor had transferred

his rights in the property to the mortgagee in satisfaction of the debt, and the mortgagee had taken possession. It was contended that for want of any acknowledgment or affidavit of good faith the mortgage was absolutely void as to the subsequent creditor Stever. The court then fully reviewed *Roy v. Scott*, and quoted fully from it, and then concluded:

"Under this ruling the mortgage held by respondent was undoubtedly valid as against the appellant Stever, who had obtained no lien before the respondent had obtained possession and asserted title."

We insist that the Supreme Court ruling of *Roy v. Scott* has become the rule of property in this state, and its authority is unimpaired by anything which the Supreme Court has said subsequently thereto. In fact, by the most recent expression of the Supreme Court its authority is reinforced, and under it the creditors now claiming under the trustee in bankruptcy are not in a position to take advantage of the highly technical points insisted upon by the trustee.

III.

It seems from the appellees' discussion under the head of THIRD B that we did not succeed in making our position clear as to the rights of the trustee in bankruptcy, although beginning on page 15 of our brief we attempted to do so. It seems to us clear that under Section 47a as amended by the Act

of 1910, the trustee in bankruptcy has all the rights, but no more than all the rights, which the creditors whom he represents would have had in the absence of bankruptcy, and assuming that these creditors reduced their claims to judgment, or otherwise by legal or equitable proceedings obtained a lien. The statute is so clear that it does not seem that much discussion would be required on this point. The cases relied upon by appellees under the head of THIRD B neither narrow nor amplify the rule which we stated in our brief. If the creditors represented by the trustee are none of them in position to resist the mortgage, and if none of them could get in position in the absence of bankruptcy proceedings to attack the mortgage, it is difficult to see how the trustee can do so. See Collier, Bankruptcy, 9th Edition, p. 659 *et seq.*, for full discussion, with cases.

We conceive the rule to be that we are no better off because of the appointment of a trustee in bankruptcy in asserting our rights under the mortgage, but we think it equally clear that we are no worse off.

If there were no bankruptcy proceedings, the most the creditors could do under this state law would be reduce their claims to judgment, levy execution and sell the property. They would then acquire exactly the rights which their judgment debtors have and would not be bona fide purchasers.

Dawson v. McCarty, 21 Wash. 314, and other cases cited on page 22 of our brief.

IV.

Under the figure 14, on page 7 of their brief, appellees claim that Heath and Leach were not the sole owners of the stock of the corporation at the time of the execution of the mortgage, but that Effie McKenzie was the owner of an undivided one-half interest in 40 shares. Inasmuch as it clearly appears that Mrs. McKenzie's rights were equitable only, and that on the books of the company the stock stood in Heath's name, and that Effie McKenzie thereafter obtained judgment, not for the stock, but for the conversion of the stock, there is nothing in that situation which would militate against our position that the corporation is estopped by the act of the president and secretary, both the members of the board, and all the record stockholders, in executing this mortgage, and in accepting and retaining the benefit thereof.

On the affidavit of Samuel McMurran appellees assert that the indebtedness to the Pacific State Bank was a pre-existing indebtedness. McMurran deduces this conclusion from an audit made by him of the books of the Raymond Box Company, and he does not allege any personal knowledge of the facts.

Paragraph 3 of the petition of the Pacific State

Bank initiating this proceeding begins as follows: "That heretofore, and on or about the second day of December, 1910, the petitioner loaned to the bankrupt the sum of $23,400," in consideration of which the note was given and the mortgage executed. This paragraph is specifically admitted by the answering creditors. (Transcript, p. 30.)

The affidavit of Miles Leach, page 59, Transcript, is "that on or about the 2nd day of December, 1910, said Raymond Box Co. became indebted to the Pacific State Bank of South Bend in the sum of $23,400," etc., said indebtedness being identified as the same indebtedness now in question. Leach was the secretary of the company and familiar with its books and affairs, and makes affidavit that he knows approximately the date (when) the indebtedness due each creditor was contracted.

The positive allegation of the petitioner and the explicit admission of the answering creditors and the positive affidavit of the secretary, who had actual knowledge of the affairs of the company and the dates when the indebtedness was incurred, all corroborate the presumption of law that the indebtedness was incurred at the date of the note, and if the point is material, which we doubt, we think the court would not be justified in finding that any part of the indebtedness was incurred prior to the date of the note and mortgage.

This is the view of the facts taken by Hon. C. H. Hanford, Judge, in deciding the case (Trans., page 102):

"In my study of the case I did not fail to notice the important facts that the claim of the bank is for a bona fide debt due and owing to it by the bankrupt corporation; that credit was given by the bank to the corporation in reliance upon the instrument purporting to be a mortgage which the parties thereto believed to have been executed with due formality and constituted a valid lien; that it is conceded by all the litigants in this case that said instrument was in fact signed, sealed with the corporate seal, acknowledged, certified, delivered and recorded at the times and in the manner indicated by the instrument itself and the endorsements thereon," etc.

We respectfully insist that the error of the court below is apparent and should be reversed.

Respectfully submitted,

H. W. B. HEWEN,

MAURICE A. LANGHORNE,

ELMER M. HAYDEN,

Attorneys for Appellant.